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# The Reality of EU-Conformity Review in France

Juscelino F. Colares<sup>\*</sup>

"Il ne peut y avoir égalité devant la loi, s'il n'y a pas unité de la loi."<sup>1</sup>

"The operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law."<sup>2</sup>

French High Courts embraced review of national legislation for conformity with EU law in different stages and following distinct approaches to EU law supremacy. This article tests whether adherence to different views on EU law supremacy has resulted in different levels of EU directive enforcement by the French High Courts. After introducing the complex French systems of statutory, treaty and constitutional review, this study explains how EU-conformity review emerged among these systems and provides an empirical analysis refuting the anecdotal view that different EU supremacy theories produce substantial differences in conformity adjudication outcomes. These Courts' uniformly high rates of EU directive enforcement and similar willingness to refer questions to the ECJ for preliminary rulings demonstrate that, despite adopting dissimilar approaches to the supremacy of Communitarian law, French judges have flourished as Communitarian law judges. The article concludes by presenting an explanation for this high degree of convergence: French judges, responding to growing European integration and enabled by a changing constitutional landscape, adjusted their views to ensure they would have a role in molding the integration of national and EU law. (JEL: F 53, K 33, K 41)

## Introduction<sup>†</sup>

Besides establishing the free flow of capital, workers, goods and services among the national states forming the nascent European Union,<sup>3</sup> Europe's Founding Fathers<sup>4</sup> aimed to

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<sup>1</sup> Jean-Marc Sauvé, *Vingt ans après . . . l'arrêt Nicolo*, in 40.1 GAZETTE DU PALAIS 5-10, at 9 (2009). The Honorable Jean-Marc Sauvé is the Chief-Justice (*Vice-président*) of the Council of State.

<sup>2</sup> *Guaranty Trust Co. v. York*, 326 U.S. 99, 112 (1945) (Felix Frankfurter, J. (speaking for the majority)).

<sup>3</sup> The EU is the supranational governmental organization, formed currently by 27 European national states, of which France, along with Germany, Italy, the Netherlands, Belgium and Luxembourg, is a founding member. Originally formed under the Treaty of Rome (1957) (also referred to as the "Treaty Establishing the European Community" since 1993) and named as the European Economic Community ("EEC"), it owes its current name to the Treaty on European

create a new legal order, premised on the respect for economic, civil and political rights administered by a new justice system: a post-national, European one. Of course, the new legal order could only come into existence if individuals—European citizens—were governed by the same law wherever they lived, worked or travelled within the bounds of a new European space no longer dominated by national borders.<sup>5</sup> To promote uniform interpretation of this new body of laws, the Treaty of Rome created the Court of Justice of the European Communities (the "European Court of Justice" or "ECJ"), the successor to the commercially-focused Court of Justice of the European Coal and Steel Community in operation since 1951.<sup>6</sup>

The ECJ has a broad and varied original jurisdiction. Not only can it entertain challenges to the legality of acts by EU institutions (art. 230), it has jurisdiction over actions by the EU Commission against member states for failure to fulfill their obligations under the Treaty of Rome (art. 226), and it can review challenges to national institutions' failures to adhere to the terms of the Treaty of Rome (*recours en carence*) (art. 232) (on grounds such as misuse of power, failure of observing due process, failure to act, etc.). Furthermore, the ECJ is competent to give "preliminary rulings" on questions (*questions*

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Union ("TEU" or the "Maastricht Treaty"), signed on February 2, 1992. Treaty on European Union and Final Act. Feb.7, 1992, 31 I.L.M. 247.

<sup>4</sup> The men commonly identified as the European Founding Fathers, largely due to their efforts toward early European construction, are Konrad Adenauer, Alcide De Gasperi and Robert Schuman.

<sup>5</sup> *La Cour de cassation et la construction juridique Européenne—L'office du juge*, in C. CASS. RAPPORT ANNUEL (2006) 93, 97.

<sup>6</sup> See Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 3 ("Treaty of Rome"). The other major supranational European Court, the European Court of Human Rights ("ECHR") was created one year earlier under the auspices of the European Convention of Human Rights. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 14, 1950 (the "European Convention of Human Rights" or the "Convention"). Because the Convention includes 20 European states outside the 27 EU members and this study focuses solely on conflicts between French national law and EU law, ECHR-related developments will only be discussed when absolutely necessary. Yet, the traditional separation between EU law and the Convention regime deserves some revision in light of the December 1, 2009 entry into force of the Treaty of Lisbon, which amended the Maastricht Treaty by, among other things, referring expressly to the European Charter of Fundamental Rights (the "Charter"), making it legally binding on all EU members. See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 50 ("Treaty of Lisbon"). Because the Charter expressly proscribes EU regulations and directives from contradicting the Convention (the UK and Poland have opted out, however), it is also binding on EU members when they are implementing EU law. See Charter of Fundamental Rights of the European Union, Dec. 14, 2007, 2007 O.J. (C 303) 15. This means that the two regimes have now converged into one, with the caveat that the Convention now has binding effect on European supranational and national actors as a matter of EU law. Because the Convention also has binding effect on all 27 EU members as a matter of their own foreign relations law due to their status as signatories, this convergence sets up interesting jurisdictional conflicts as national courts face the possibility of having to choose between potentially different interpretations of human rights law between the ECJ and ECHR.

*préjudicielles*) regarding EU law referred to it by national courts or tribunals (art. 234).<sup>7</sup> Specifically, article 234 grants national judges the discretion (lower-level national courts) or obligation (national courts of last resort) to refer any nontrivial EU law question necessary to the disposition of a case to the ECJ.

As vast as the ECJ's original jurisdiction is, about half of its caseload is derived from its connections with national courts,<sup>8</sup> whether through referrals of preliminary questions by national courts or challenges to the conformity of decisions by the latter with Communitarian (i.e., European Union) law and precedents.<sup>9</sup> Yet, these few treaty-sanctioned linkages between the ECJ and national judges illustrate only superficially the very important role national judges have played in construing and developing Communitarian law. Despite the lack of a specific grant of authority in the major European treaties, national judges have uniformly interpreted the power of referral to include an implicit authorization to act as ordinary judges of Communitarian law.<sup>10</sup> Acting to ensure uniformity in the application of EU law, national judges and courts have the power to set aside domestic law in favor of Communitarian law in disputes before them.<sup>11</sup>

This article offers the first systematic study of how the French High Courts—judicial (*Cour de cassation* (Cassation)), administrative (*Conseil d'État* (Council of State)) and constitutional (*Conseil constitutionnel* (Constitutional Council or the Council))—have decided disputes regarding the conformity of French national laws to European Union ("EU") directives. Under article 249 of the Treaty of Rome, member states are required to implement all EU directives by enacting a new statute (i.e., a law of transposition) or by utilizing any other "form or method" of regulation that produces the results intended in the directives. Because the scope of a given national law or regulation may at times intersect with that of a directive, irrespective of whether such norm is specifically intended to transpose a directive, this study investigates not only challenges to the conformity of

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<sup>7</sup> Two additional supranational judicial institutions have been created to assist the ECJ in its multiple tasks and thus operate under its supervision: the Court of First Instance (1988) and the Civil Service Tribunal (2004).

<sup>8</sup> See COURT OF JUSTICE OF THE EUROPEAN UNION, ANNUAL REPORT (2008) 82 (reporting 288 referrals of preliminary questions and 210 direct actions (some of which are actions for failure to fulfill obligations by national governments) out of a total of 592 new cases filed in the ECJ that year).

<sup>9</sup> Following standard parlance, this article uses the terms "EU law" and "Communitarian law" interchangeably.

<sup>10</sup> See, e.g., Jean-Guy Huglo, *La mission spécifique d'une Cour suprême dans l'application du droit communautaire: l'exemple de la Cour de cassation française*, in 26 GAZETTE DU PALAIS 1972 (2000) (describing Cassation's role in the application of EU law in France as deriving from its power of referral) (The Honorable Jean-Guy Huglo is a *Conseiller référendaire* at the Court of Cassation).

<sup>11</sup> See, e.g., Guy Canivet, *Avant-Propos*, in 26 GAZETTE DU PALAIS 1971 (2000) (The Honorable Guy Canivet, writing then as Chief-Justice (*Premier président*) of the Court of Cassation, is currently an Associate-Justice (*Membre*) of the Constitutional Council); and Sauvé, *supra* note 1 at 9.

national laws of transposition to directives but also broader conflicts between national measures (including regulations and administrative acts) and directives.

Thus, this study analyzes the extent to which the French High Courts have applied domestic law in contemplation of European directives. In doing so, this article expands on the existing literature in two key ways. First, it attempts to verify empirically whether there are any discernable differences among these Courts in how they have decided disputes involving conflicts between French law and EU directives (i.e., regardless whether a transposing law is involved). It analyzes the High Courts' decisions from 1989 to 2008 to determine whether national adjudicators have taken a pro-Europe or Euroskeptical stance based on how deferential each Court has been to EU directives in these conflict cases. The study tests whether any observable difference emerges in the patterns of decisions adopted by these Courts. Second, after detecting a tendency towards convergence in their deferential treatment of EU law and ECJ precedent, the article presents an overarching rationale for the growing degree of convergence, one largely based on shifting perceptions of Europe and its institutions, fostered by continuous constitutional reforms, judicial adaptation and growing European judicial comity.

Part I of this article briefly reviews the legal and political science literature on the relationship between national and supranational courts on both sides of the Atlantic and ponders whether a focus on supranational courts can accurately reveal the truly multidimensional nature of European judicial integration. After making the case that it cannot, the article discusses more recent French scholarship on the subject and illustrates its richness by focusing on the role played by the ensemble of the French judiciary.

In light of (a) this study's inquiry on French national courts' role as European adjudicators and (b) the uniqueness of the French judicial system, Part II provides a primer on its basic characteristics. The uniqueness of the French judicial system, it will be demonstrated, owes much to France's historic attachment to legislative sovereignty (or the theory of the *loi-écran*, as it is known in France), namely the political-legal doctrine under which promulgated statutes (until quite recently) could not be challenged before any court. Part II shows that this limitation on the jurisdiction of French courts is one of the major reasons for the development of a dual system of review: where a priori constitutional review<sup>12</sup> operates on parallel with ex post conformity review, the latter of which is the focus of this article.<sup>13</sup> Part II identifies and explains these review systems as responses to

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<sup>12</sup> By a priori constitutional review, I refer to the-until-recently sole method of constitutional review in France: abstract review. This method of review remains restricted to certain political actors who have standing to file constitutionally-based challenges against approved but yet-to-be promulgated bills, thus forming a case that is heard exclusively by the Constitutional Council. See 1958 CONST., art. 61-1. I will discuss the implications of the recent introduction of ex post constitutional review later in this article.

<sup>13</sup> By ex post conformity review, I refer solely to court challenges to the conformity of *promulgated* national law (hence ex post) and other government acts with respect to France's international engagements. As will be shown, this form of review, though not expressly authorized in the Constitution, has been interpreted by the French High Courts to be essential for the effective enforcement of article 55 of their Constitution. However, as stated in note 6, this article focuses only on the subset of conformity review litigation that involves challenges to

historic-legal constraints that have deeply affected the manner in which both the Council itself and the other High Courts conduct all review in France, thus having a direct impact on how French adjudicators apply EU law.

Following Part II's discussion of the Constitutional Council's development of a dichotomous review system, Part III turns to both Cassation's<sup>14</sup> and Council of State's<sup>15</sup> initial deployment of conformity review in the *Vabre* (1975) and *Nicolo* (1989) decisions. These were the pivotal moments where these Courts, after an invitation by the Constitutional Council, "found" an implicit authorization under the Constitution to review the conformity of a French statute with respect to the Treaty of Rome, thus deploying conformity review in France. Part IV provides a methodology for the development of the study's database. Part V offers a quantitative analysis that shows a high degree of convergence among the High Courts in their treatment of national law/EU directive conflicts, a convergence that reveals a high degree of deference to EU directives. The implications of a strong convergence and alignment among these courts with respect to European supranational jurisprudence are also examined.

This article concludes by suggesting that the Constitutional Reform of 2008,<sup>16</sup> which expanded the Constitutional Council's jurisdiction to *ex post*, concrete (i.e., "as-applied") constitutional review, introduces a number of challenging questions that will occupy the minds of French High Court Justices for years to come. As a newer system of constitutional review begins operating side-by-side with a largely overlapping EU law conformity review system, which increases the likelihood of jurisdictional disputes, the relationship among French Justices and their relationship with the ECJ are likely to face new pressures.

## I. Prior Literature on European Judicial Integration

Despite significant scholarly interest in the United States and Great Britain on European integration, American<sup>17</sup> and British comparativists and political scientists tend to

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existing national laws vis-à-vis EU law. Thus, conflicts between French law and other European law (e.g., the Convention) or international law are outside the scope of this article.

<sup>14</sup> *Administration des Douanes v. Société des Cafés Jacques Vabre & J. Weigel et Cie. SARL*, [1975] 2 CMLR 336 (Cass., Ch. mix. 6, May 24, 1975) (Court of Cassation, Combined Chambers) (Invalidating an internal consumption tax established by the French Customs Code due to its incompatibility with certain provisions of the Treaty of Rome and holding that Communitarian law, by virtue of article 55 of the Constitution, constitutes "a separate legal order integrated with that of the Member states . . . and is binding on their courts.").

<sup>15</sup> *Raoul Georges Nicolo and Another*, [1990]1 CMLR 173 (Conseil d'Etat, Ass., October 20, 1989) (Council of State, Assembly) (holding that a national law providing rules for the election of representatives to the Assembly of the European Communities was not in conflict with certain provisions of the Treaty of Rome, after finding that article 55 of the Constitution implicitly authorized the Court to engage in conformity review).

<sup>16</sup> This Reform was approved by the French Parliament on July 21, 2008. See Constitutional Law no. 2008-724 of July 23, 2008 on Modernizing the Institutions of the Fifth Republic, n.1.

<sup>17</sup> I use the term "American" to refer to ideas, people and things emanating from the United States. That is the case even when they did not come originally from the United States.

examine the relationship between national law and EU law from a supranational perspective, often subsuming discussions of national courts' decisions under analyses of European Court of Justice ("ECJ") decisions.<sup>18</sup> This supranational focus is influenced by the tremendous growth of EU judicial and non-judicial institutions and the particular path of constitutionalization they pursued—a path paved largely by supranational judicial lawmaking and technocrat-driven incremental treaty-making.<sup>19</sup>

At first look, it seems reasonable that, as a substantial portion of law-creation moves away from individual states to the purview of supranational institutions and actors, legal analysis should shift away from a purely state-centric approach. This shift, however, does not require that all analysis of European integration occur only at high levels of aggregation. That would risk ignoring the very rich and illuminating contribution that diverse state-based legal institutions have given to this process. A "bottom-up" study of this integration process that takes the French High Courts as a point of departure would explain how gradually, over the last fifty-years, these institutions distanced themselves from purely state-centric perspectives to embrace the underlying values inspiring the creation of the EU.<sup>20</sup> Thus, top-bottom, supremacy-infused analyses of EU law and

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<sup>18</sup> See, e.g., JOSEPH H. WEILER & MARLENE WIND, *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE* (2003); Joseph H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403-83 (1991) (both proposing that Europe's constitutional order has emerged from ECJ jurisprudence); and MICHELLE EVERSON AND JULIA EISNER, *THE MAKING OF A EUROPEAN CONSTITUTION: JUDGES AND LAW BEYOND CONSTITUTIVE POWER* (2007) (articulating the view that ECJ jurisprudence has driven EU's constitutionalization process, one that dispenses with the need for a conventional constituent forms of constitutional drafting). For illuminating comparative work that incorporates both national and supranational judicial perspectives, see MITCHEL DE S. -O. -L'E. LASSER, *JUDICIAL DELIBERATIONS—A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY* (2004); and ALEC STONE SWEET, *GOVERNING WITH JUDGES—CONSTITUTIONAL POLITICS IN EUROPE* (2000). Similar high levels of aggregation also predominate in current U.S.-based research on European human rights law. Compare YONATAN LUPU & ERIK VOETEN, *THE ROLE OF PRECEDENT AT THE EUROPEAN COURT OF HUMAN RIGHTS: A NETWORK ANALYSIS OF CASE CITATIONS* (2010) (concluding that the ECHR uses case law to both justify its decisions and develop legal norms), available at <http://ssrn.com/abstract=1549947>, with their French counterparts, Michel Troper & Christophe Grzegorzczuk, *Precedent in France*, in D. Neil MacCormick and Robert S. Summers, eds., *INTERPRETING PRECEDENTS: A COMPARATIVE STUDY* (Ashgate Publishing 1997) (explaining why French courts are less inclined to justify their decisions on precedent than courts in common law countries).

<sup>19</sup> See Grainne de Búrca, *The Drafting of a Constitution for the European Union: Europe's Madisonian Moment or a Moment of Madness?*, 61 WASH. & LEE L. REV. 555-83, 556-58. For a critique of judicial constitutionalization, see Martin M. Shapiro, *Comparative Law and Comparative Politics*, 53 S. CAL. L. REV. 537-42 (1980).

<sup>20</sup> Indeed, other "bottom-up" international law scholars have observed that transnational legal orders rely heavily on collaboration among cross-border domestic judicial, administrative and legislative networks as well as nonstate actors. See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (Princeton University Press) (2004) (discussing the concept of the disaggregated state) and Kenneth W. Abbott, *Strengthening International Regulation Through Transnational New Governance*, 42 VANDERBILT J. TRANSNAT'L L. 501 (Summer 2009) (arguing that diverse combinations of nonstate and state actors often cooperate and, in some instances, even create innovative institutions to apply transnational norms to business).

institutions ought to be complemented by analyses that account for the dynamic and complex relationships among national and supranational adjudicators.

Unlike their U.S. counterparts, most French commentators (i.e., law professors and academically-inclined lawyers) adopt the latter approach. They typically focus on rulings by national courts and analyze the evolving status of European law in France, while adding commentary on ECJ jurisprudence.<sup>21</sup> This scholarship is highly valuable due to its enlightening discussion of questions regarding domestic implementation of EU directives in full view of supranational processes, but, unfortunately, tends to be available only in French.<sup>22</sup> Although these studies benefit from approaching EU law from both national and supranational perspectives, they often overemphasize punctual friction points (i.e., exceptional cases) between the French High Courts and the ECJ and, therefore, fail to give due credit to the high level of inter-institutional mutual cooperation in the vast majority of their important decisions.<sup>23</sup>

Remarkably, a number of judge-written articles have appeared throughout the last decade to explain how French judges view the role of EU law.<sup>24</sup> These articles might arguably be considered an attempt to offset French scholars' tendency to focus on exceptional decisions and occasional friction by depicting the relationship between judges and EU law and institutions as a far more cooperative venture. Regardless, to effectively

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<sup>21</sup> See, e.g., Anne Levade, *La constitutionnalité des lois de transposition entre conformité et compatibilité*, 1291-1306 MÉLANGES EN L'HONNEUR DE LOUIS FAVOREAU (Daloz 2007); Bertran Mathieu, *Le contrôle des lois de transposition des directives communautaires par le Conseil constitutionnel ou les difficultés du cartésianisme*, 1307-16 MÉLANGES EN L'HONNEUR DE LOUIS FAVOREAU (Daloz 2007); Florence Chaltiel, *Droit constitutionnel et droit communautaire—Nouvelle précision sur les rapports entre le droit constitutionnel et le droit communautaire—La décision du Conseil constitutionnel du 27 juillet 2006 sur la loi relative aux droits d'auteurs*, 68 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL, 837-47 (2006); Bruno Genevois, *Le Conseil constitutionnel et le droit communautaire dérivé—A propos de la décision n° 2004-496 DC du 10 juin 2004*, REVUE FRANÇAISE DE DROIT ADMINISTRATIF, 651-61 (July-August 2004); and Jacques Arrighi de Casanova, *La décision n° 2004-496 DC du 10 juin 2004 et la hiérarchie des normes*, ACTUALITÉ JURIDIQUE – DROIT ADMINISTRATIF, 1534-37 (July 26, 2004).

<sup>22</sup> But see Marie-Claire Ponthoreau and Frabrice Hourquebie, *The French 'Conseil Constitutionnel': An Evolving Form of Constitutional Justice*, 3.2 THE JOURNAL OF COMPARATIVE LAW 269 (2008), and Xavier Groussot, *EU Law Principles in French Public Law: 'Un Accueil Réservé,'* 0 REVIEW OF EUROPEAN ADMINISTRATIVE LAW 9 (2007).

<sup>23</sup> See note 21.

<sup>24</sup> See, e.g., Jacques Biancarelli et al., *Peut-on parler d'un "renouveau européen" du Conseil d'Etat depuis 2007*, 1-16 (forthcoming in MÉLANGES EN L'HONNEUR DE PHILIPPE MANIN, 2009) (The Honorable Jacques Biancarelli is a *Conseiller d'Etat*); Sauvé, *supra* note 1 at 9; Bernard Stirn, *Le Conseil d'Etat et les juridictions communautaires: un demi-siècle de dialogue des juges*, in 40.2 GAZETTE DU PALAIS 3-7, at 3 (2009) (The Honorable Bernard Stirn is President of the Litigation Section of the Council of State); Canivet *supra* note 11 at 1971; Huglo *supra* note 10 at 1972-78; Christophe Soulard, *L'application du droit communautaire par la chambre criminelle de la Cour de cassation*, in *id.*, at 1991-2001 (The Honorable Christophe Soulard is a *Conseiller référendaire* at the Court of Cassation).



change the narrative of French-EU judicial relations from a "war of the judges" to a similarly broad "dialogue of the judges,"<sup>25</sup> one needs more than anecdotal evidence of such cooperation. One must empirically demonstrate the extent of judicial integration of the EU legal order in France by looking at how the French High Courts have applied domestic law in contemplation of European directives. Surely, the ideal balance between wealth of information and generalization in studies of European judicial integration could be reached by a series of country-specific empirical studies, like the present one, where patterns of judicial integration are investigated, and the picture sketched by supranational research complemented. To accomplish this goal, at least with respect to France, one must first understand the lay of the judicial landscape, a matter to which I now turn.

## **II. The Uniqueness of Review in France and the Constitutional Council**

### **A. The Nature of Review in France**

To understand how EU-conformity litigation sprung from the Constitutional Council's jurisprudence to become a full-fledged review system operated by the Court of Cassation and the Council of State, one must first disabuse oneself of the notion that French judges engage in "judicial review," as the term is traditionally employed this side of the Atlantic. Clearly, the term cannot be used in countries like France, where ordinary judges and courts lack the power to adjudicate the constitutionality of legislated law, whether in as-applied or facial challenges.<sup>26</sup> In fact, in much of Continental Europe, the task of the judiciary has been merely to guarantee the supremacy of parliamentary acts over decrees, regulations and administrative acts. This does not mean that constitutional provisions are parameters to be employed solely by legislators as they consider enacting statutes. Rather, it means that only a certain type of court, the constitutional court, has subject-matter jurisdiction over constitutional disputes. In fact, the detachment of constitutional courts from the hierarchy of the judiciary (broadly understood)<sup>27</sup> mirrors the detachment of constitutional law from the hierarchy of infra-constitutional laws, further demonstrating the separation between constitutional and infra-constitutional law. This separate reserve for constitutional-order questions also explains why, traditionally, the competence of constitutional courts was limited to answering discrete constitutional questions referred to them by a very limited number of actors: certain politicians (i.e., the few who until recently held the monopoly on standing to trigger constitutional review in France) or High Courts (as it has been the case in Spain, Italy and, since 2010, France). Clearly, such referrals from the legislature and the judiciary to national constitutional courts constitute a form of abstract constitutional adjudication far removed from the traditional "case or controversy" judicial review that takes place in the United States.

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<sup>25</sup> These expressions have been attributed to Advocate-General Bruno Genevois. See Stirn, *supra* note 24 at 3.

<sup>26</sup> See Martin J. Shapiro and Alec Stone Sweet, *Introduction: The New Constitutional Politics*, 26 COMP. POL. STUD. 397, 400 (1994).

<sup>27</sup> From now on, I use the terms "judiciary" and "judicial" (and their variations) indiscriminately to include all judges in France's two legal orders (judicial and administrative), but not the detached Constitutional Council.

Indeed, using judicial review to describe the work of judges is even more problematic in France, where Jean-Jacques Rousseau's thinking on separation of powers led to their subjugation to legislative authority.<sup>28</sup> In 1790, the legislature created the predecessor to today's Court of Cassation and placed it under its supervision to ensure that judges nominated during the *Ancien Régime* did not interpret the new laws against the interests of Revolutionary France.<sup>29</sup> Although the Revolutionary period's strong version of legislative sovereignty has long been abandoned, legislative supremacy, in its moderate versions, greatly influenced the formation of France's bifurcated judiciary and thus remains a part of French legal culture.<sup>30</sup>

Finally, even the recent constitutional reform, which gave the Constitutional Council the authority to displace legislated law deemed constitutionally infirm, placed far more restrictions on this form of review than is typically placed on traditional versions of judicial review.<sup>31</sup> For instance, the Council only hears *referrals*, so no writ mechanism links ordinary citizens with the Council or gives it discretion to choose the cases it reviews. Rather, the Council's task is to answer *questions prioritaires de constitutionnalité*, i.e., incidental questions involving constitutional issues in live cases pending before the French courts. Procedurally, the Council only takes jurisdiction over the question presented to it, not the entire case.<sup>32</sup> These distinctions suggest that, clearly, it is best to use the broader term "review" adding to it a more contextually adequate qualifier—as in constitutional review versus conformity review, abstract review versus concrete review, or some other adjective—rather than falling prey to applying familiar but not necessarily overlapping concepts. With these qualifications in mind, the path is now clear to explain how conformity review appeared as a second system of review in France.

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<sup>28</sup> This subjugation is implicit in Rousseau's belief that "the law is the expression of General Will," also inscribed in article 6 of the 1789 Declaration of the Rights of Man and of the Citizen.

<sup>29</sup> See Decree of November August 16-24, 1790, in 1 COLLECTION COMPLÈTE DES LOIS, DÉCRETS, ORDONANCES, RÈGLEMENTS, ET AVIS DU CONSEIL D'ÉTAT, 361 (J. Duvergier, ed., 1824).

<sup>30</sup> It is quite significant that French judges and courts are only briefly mentioned in the French Constitution as the "Judiciary Authority," now placed under the supervision of the President. See 1958 CONST., art. 64. Note that the last obstacle to *ex post* judicial review of all primary legislation was finally removed in France in 2008 (review began in 2010).

<sup>31</sup> See Constitutional Law no. 2008-724, *supra* note 16, article 29 (providing the new text of article 61 of the French Constitution). See also Organic Law No. 2009-1523 of December 10, 2009 (providing statutory implementation of art. 61-1 of the Constitution); Decree No. 2010-148 of February 16, 2010 (presidential order implementing the Organic Law and providing the procedure to be followed by the Council of State and Cassation) and Constitutional Council February 4, 2010 Decision on Internal Rules (*Règlement Intérieur*) of Procedure for Priority Questions of Constitutionality ("PQC"), available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2010/reglement-interieur-qpc/decision-reglement-interieur-qpc-du-04-fevrier-2010.47904.html>.

<sup>32</sup> See 1958 CONST., art. 61-1 (as amended). The amended Article 61 does increase the jurisdiction of the French constitutional court beyond *ex ante* abstract review into *ex post*, concrete review, but it also gives the Court of Cassation and Council of State the important authority to decide which cases are worthy of referral. See 1958 CONST., art. 61-1.

## B. The Constitutional Council and the Evolution of Its Jurisdiction

### 1. The Early Years

The Constitution of the Fifth Republic (1958) created a new system of government in France: one that established presidential primacy over the Parliament.<sup>33</sup> Michel Debré, de Gaulle's Prime Minister, key political ally and the major drafter of the 1958 Constitution, summarized this political oxymoron best when he described the Constitution "as a 'parliamentary régime' in which the presidency was 'the keystone'."<sup>34</sup> Despite the decline in Parliament's power, due to the emergence of the presidency, and the introduction of constitutional review, promulgated statutes retained their status as the expression of the "General Will" and, thus, could not be displaced by either the newly created Constitutional Council or France's judiciary.<sup>35</sup>

In fact, so unswerving was the framer's adherence to parliamentary sovereignty that *ex post* review was placed outside the purview of the Constitutional Council or of any other court in France. As the logic of the times seemed to dictate, article 61 would not confer on the Council any express jurisdiction over fundamental rights—these could be used to strike down approved laws that did not conform to constitutional rights. Rather, article 61 appeared to circumscribe the scope of Council constitutional review simply to questions regarding the constitutionality of Acts of Parliament.<sup>36</sup> This meant that Council review would be deployed exclusively to ensure that Parliament would not act beyond the confines of its article 34 powers, so as not to encroach on the President's constitutional prerogatives.

Operationally, this lack of jurisdiction over disputes involving the constitutionality of *promulgated* law required that Council review occur during the brief period between parliamentary passage of a new bill and presidential promulgation, that is, before a statute

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<sup>33</sup> See 1958 CONST., arts. 5-19.

<sup>34</sup> ANDREW KNAPP AND VINCENT WRIGHT, *THE GOVERNMENT AND POLITICS OF FRANCE*, 59 (Routledge, 2006). Michel Debré was Minister of Justice during elaboration of the 1958 Constitution. See Jean-Louis Debré, Chief-Justice (*Premier président*), Constitutional Council, *Clôture*, Closing Address at *Colloque du 3 Novembre 2008, 50ème anniversaire du Conseil constitutionnel*, in *LES CAHIERS DU CONSEIL CONSTITUTIONNEL*, 87, 89 (2009) (out-of-series volume).

<sup>35</sup> See 1958 CONST., art. 61 (as amended). In fact, a proposal giving Cassation and the Council of State the power to refer to the Constitutional Council questions regarding the constitutionality of statutes in concrete cases was rejected by the original framers largely on grounds that it would introduce a "government of judges," revealing the strong mistrust of the judiciary among the French political classes, both left and right. See *TRAVAUX PRÉPARATOIRES DE LA CONSTITUTION DU 4 OCTOBRE 1958, AVIS ET DÉBATS DU COMITÉ CONSULTATIF CONSTITUTIONNEL* (Documentation Française, 1960), 75-80, 101-02, 164-65. This mistrust is best illustrated by article 64 of the Constitution, which, instead of treating the judiciary separately as a branch of the state, calls it "judicial authority," thus reducing its designation merely to the task it performs.

<sup>36</sup> The Constitutional Council also had (and it still has) original jurisdiction over disputes regarding the regularity of presidential elections and observance of the internal rules of the two Chambers of Parliament. See 1958 CONST., art. 61. This jurisdiction of the Council is not relevant to the discussion in this article.

was finally "on the books." In other words, review was necessarily *a priori* and, thus, abstract in nature.<sup>37</sup> Furthermore, to foreclose the Council from ever displacing parliamentary majorities' choices where the President's political interests were in no way threatened, the drafters reserved the right to refer laws to the Council to only a few major political actors: the President of the Republic, the Prime-Minister and the Presidents of both Chambers of Parliament.<sup>38</sup> Clearly, this design vastly maximized institutional stability at the cost of suppressing minority opposition and citizen input. It also meant that the Constitutional Council was not born a full-blown constitutional court, rather it was expected to perform the role of a quasi-judicial appendage of Parliament, thus allowing the consolidation of presidential powers in the first years of the Fifth Republic.<sup>39</sup> As expected, there were few referrals during this early period, none of which included a constitutional question of great political salience.<sup>40</sup> The Council's limited constitutional jurisdiction, no doubt part and parcel of an institutional design meant to further the role of the presidency in the French political and constitutional order, would undergo major transformations in the 1970s.

## 2. The Birth of Positive Constitutional Review

Few decisions are as transformative to a legal order—and surely to the reviewing body that announces them—as those establishing entirely novel competencies. France's "Marbury"<sup>41</sup> moment came with the Constitutional Council's *Liberté d'Association* ruling.<sup>42</sup> The July 16, 1971 decision resulted from a referral by Alain Poher, the President of the Senate and former candidate for the presidency in 1968.<sup>43</sup> Mr. Poher triggered the events by referring a challenge to the constitutionality of a National Assembly-approved bill meant to give certain superior officers in the national administration (i.e., *préfets*) the right

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<sup>37</sup> See 1958 CONST., art. 61.

<sup>38</sup> See *id.*

<sup>39</sup> See SWEET, *supra* note 18 at 41.

<sup>40</sup> Only 45 constitutional challenges were referred to the Council between 1958 and 1971. See Louis Favoreu & Loïc Philip, LES GRANDES DÉCISIONS DU CONSEIL CONSTITUTIONNEL 937, 937-38 (2007) (14th ed. Dalloz).

<sup>41</sup> See *Marbury v. Madison*, 5 U.S. 137 (1803) (Cranch) (holding that a judge's oath to uphold the Constitution and the Supremacy Clause implicitly authorize courts to review and strike down Acts of Congress deemed contrary to the Constitution).

<sup>42</sup> *Liberté d'Association*, 71-44 DC, REC. 29, RJC I-24 (July 16, 1971) (*considérant* 2) (declaring "in the name of the fundamental principles recognized by the laws of the Republic and solemnly reaffirmed by the Preamble of the [1958] Constitution," which also references the preamble of the 1946 Constitution and the 1789 Declaration of the Rights of Man and of the Citizen, *that a constitutional right of free association exists*, according to which all associations shall be constituted and governed by the sole will of their members) (emphasis added), available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/1971/71-44-dc/decision-n-71-44-dc-du-16-juillet-1971.7217.html>.

<sup>43</sup> See Ponthoreau & Hourquebie, *supra* note 22 at 276.

to refuse credentialing civil organizations deemed to threaten the integrity of the French state and the public order.<sup>44</sup>

From the Council's perspective, considering the merits of this referral marked, by itself, a significant shift: it meant transcending the typically negative nature of its encroachment review of Parliament into the potentially rights-creating, hence positive, review of the *content* of a particular fundamental right. The Council found this authority in the "fundamental principles recognized under the laws of the Republic and solemnly reaffirmed in the Preamble" of the 1958 Constitution,<sup>45</sup> the latter containing references to numerous sources of fundamental rights, such as the Declaration of Rights of Man of 1789 and the Preamble of the 1946 Constitution.<sup>46</sup> Given the political and institutional stakes involved, the Council's holding in *Liberté d'Association*—invalidating portions of the bill due to violations of the right of free association—while significant, was far less consequential than its decision to incorporate sources of substantive economic and social rights into the *bloc de constitutionnalité*, against which all future bills would be evaluated. For in promoting such incorporation, the Council effectively opened the gates to positive constitutional adjudication.

Yet, opening the gates would not amount to much without a steady flow of referrals. During the early years, their volume and relevance remained severely constrained due to rules that bestowed on few political actors the standing to initiate such review. Certainly, it did not help that these actors until then had belonged to the same center-right/right majority, to whom making frequent referrals would be counterproductive. The Constitutional Reform of 1974 relaxed standing requirements and, thus, gave a further boost to the Council's newfound constitutional powers. Cognizant of his narrow electoral victory in the 1974 presidential election and seeking to create safeguards against a future leftist government, President Valéry Giscard d'Estaing successfully proposed a constitutional amendment extending to any combination of 60 Deputies or 60 Senators the right to refer legislation to the Council.<sup>47</sup> By giving minority coalitions, i.e., the opposition, the right to trigger constitutional review of bills, the amended article 61 provided the caseload the Council needed to perform its new mission as a positive constitutional adjudicator. In fact, adding the opposition to the roster of referring authorities caused an explosion in the number of referrals: in contrast with 51 referrals in its first 15 years (1958-73), the Council entertained a total of 221 referrals in the following 15 years (1974-89), a more than fourfold increase (i.e., 423%) in the Council's constitutional docket.<sup>48</sup>

### C. The Strange Birth of Conformity Review in France

Just as the growth in the Council's constitutional activity was about to take off, at a time when its members and the political class had not yet become accustomed to the idea

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<sup>44</sup> See Favoreu & Philip, *supra* note 40 at 238 n. 2.

<sup>45</sup> See *Liberté d'association*, REC. 29 (*considérant* 2.).

<sup>46</sup> See 1958 CONST., Preamble.

<sup>47</sup> See Ponthoreau & Hourquebie, *supra* note 22 at 276-77.

<sup>48</sup> See Favoreu & Philip, *supra* note 40 at 937-54.

that parliamentary bills can be overridden by positive constitutional adjudicators, the Council entertained a case that would profoundly affect the manner in which all French judges would approach the relationship between national law and France's international commitments. On December 20, 1974 a splinter group of majority coalition Deputies, dissatisfied with a government-sponsored bill that allowed abortions prior to the tenth week of the gestational period in situations of "mother distress," relied on the recently amended article 61 to challenge the bill's constitutionality and international conformity.<sup>49</sup> Reviewing the bill strictly as a referral under article 61, the Council declared that the challenged provision did not violate the individual freedom (i.e., *liberté*) "enunciated in article 2 of the Declaration of the Rights of Man and the Citizen,"<sup>50</sup> and thus held the bill as constitutional.<sup>51</sup> However, when pressed to determine whether the national legislation conformed to the European Convention of Human Rights, the Council deferred. The Council reasoned that, by virtue of the "difference in the nature of these two reviews,"<sup>52</sup> i.e., constitutional review (pursuant to art. 61) and conformity review (pursuant to article 55<sup>53</sup>), "it lacked competence, once seized under article 61, to evaluate the conformity of a [national] law with the provisions of a treaty or an international agreement," the latter an attribution of article 55.<sup>54</sup>

By adopting this interpretation, the Council abdicated from conducting review of legislation for compliance with France's international commitments. This occurred at a moment when the process of European integration was accelerating. In hindsight, the Council's decision to pass on conformity review seems remarkable and unwise. French scholars have written volumes criticizing *IVG*,<sup>55</sup> some even pondering how the Council could abandon it.<sup>56</sup> While addressing these criticisms would require going beyond the scope of this study, suffice it to say that, logistically, the Council was not prepared then (and, in my view, is still not prepared now) to be confronted with one more expansion on its jurisdiction given the compressed timeframe under which it operates (30 days).<sup>57</sup> Still, the

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<sup>49</sup> See *id.* at 298. Remarkably, French legal historians have told this author that, since the 1974 Reform, this remains the only instance in which the majority has referred a bill to the Council.

<sup>50</sup> See *Interruption volontaire de grossesse*, 74-54 DC, REC. 19, RJC I-30 (January 15, 1975) (*considérant* 8) ("*IVG*"), available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/1975/74-54-dc/decision-n-74-54-dc-du-15-janvier-1975.7423.html>.

<sup>51</sup> See *IVG*, REC. 19 (*Article premier*).

<sup>52</sup> See *Id.* (*considérant* 6).

<sup>53</sup> Article 55 provides: "Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party." 1958 CONST.

<sup>54</sup> See *IVG*, REC. 19 (*considérant* 7).

<sup>55</sup> For a sample of these studies, see Favoreu & Philip, *supra* note 40 at 291.

<sup>56</sup> Guy Car cassone & Bruno Genevois, *Faut-il maintenir la jurisprudence issue de la décision n°74-54 DC du 15 janvier 1975?*, 7 CAHIERS DU CONSEIL CONSTITUTIONNEL 95 (1999).

<sup>57</sup> See 1958 CONST., art. 61.

bigger story here lies elsewhere, for, despite the Council's narrow construction of its article 61 jurisdiction, conformity review did not go without effective judicial supervision in France.

### III. The Emergence of Conformity Review: Enter Cassation and Council of State

Conformity review emerged in France in three stages: first, barely four months after *IVG*, at Cassation; second, fifteen years later, at a reluctant Council of State; and, finally, at the Constitutional Council, in 2004, and this only after a constitutional amendment expressly incorporated EU law into domestic law.<sup>58</sup> Such incorporation prompted the Council to engage in a new, quite narrow form of conformity review, still subsumed under its traditional abstract constitutional review.<sup>59</sup> While somewhat confusing, this staggered adoption of conformity review reflects the High Courts' perceptions of their roles and capabilities, as well as their differing views on European integration overtime, which has also contributed to their being perceived as varying in their commitment to European judicial integration.<sup>60</sup> After a brief description of the evolution of this new form of review in these Courts, this article will turn to an analysis of the empirical validity of such perceptions and other hypotheses.

#### A. Cassation's Embrace of Conformity Review

Soon after *IVG*, Cassation entertained an appeal from a decision by the Appellate Court of Paris that had invalidated a French consumption tax (article 265 of the French Customs Code) due to its incompatibility with article 95 of the Treaty of Rome.<sup>61</sup> Remarkably, Advocate General (*Procureur Général*) Touffait urged Cassation to embrace conformity review and maintain the decision to strike down the French statute *solely* on Treaty of Rome grounds. The idea behind basing this decision on this sole independent legal ground was to establish that the supremacy of EU law in France rested not merely on French constitutional law (i.e., article 55 of the Constitution, hence the provenance of the Council), but on EU law itself (i.e., the Treaty of Rome as construed

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<sup>58</sup> The constitutional reform of 1992, which allowed the ratification of the Maastricht Treaty, altered article 88 of the Constitution by giving EU law a specific *constitutional* status in French law. The amended article 88-I reads: "The Republic shall participate in the European Communities and in the [EU] constituted by States which have freely chosen by virtue of the treaties which established them to exercise some of their powers in common." 1958 CONST.

<sup>59</sup> See *Loi pour la confiance dans l'économie numérique*, 2004-496 DC (June 10, 2004) (*considérant* 7) (declaring that "the transposition of a Community directive into domestic law is a constitutional requirement" and that, as such, laws of transposition are subject to review) ("*Economie numérique*"), available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2004/2004-496-dc/decision-n-2004-496-dc-du-10-juin-2004.901.html>.

<sup>60</sup> For a rare commentary in English illustrating the conventional wisdom regarding the different approaches the Council of State and Cassation have adopted with respect to EU law, see Groussot, *supra* note 22 at 35-36.

<sup>61</sup> *Société des Cafés Jacques Vabre*, Cass., Ch. Mixte, D. 1974, 159 (May 24, 1975) ("*Vabre*").

by the ECJ,<sup>62</sup> the provenance of French judges as ordinary judges of Communitarian law). To Touffait, the principle that EU law applies in France as a result of its concurrent, yet independent, sovereignty with the Constitution derived from the fact that "the transfer of power made by the Member States from their internal legal orders in favor of the legal order of the Community" had operated a "definitive limitation of their sovereign rights."<sup>63</sup> In sum, EU law was binding regardless of its status in French law.

Despite prior ECJ rulings on Communitarian law's supremacy and self-executing status,<sup>64</sup> to make such a proposition to Cassation at that time might have seemed radical if one considers the history of legislative supremacy in France. However, in light of France's obligation to bring its laws into conformity with Communitarian law and the Constitutional Council's major abdication of conformity jurisdiction in *IVG*, it was necessary to fill that void. Indeed, the Advocate General expressly recognized the need for conformity review of French statutes by stating that "from the position taken by the Council, one can thus conclude that it falls on the courts before which this problem has been presented, and it inheres to them alone, under penalty of denial of justice, the task of addressing it."<sup>65</sup> Cassation accepted the invitation and became the first French High Court to strike down a national *statute* (not merely a bill) for incompatibility with the Treaty of Rome. Yet, while recognizing that the Treaty of Rome had created a "separate legal order," the Justices at Cassation still referred to article 55's treaty supremacy clause as concurrent authority.<sup>66</sup>

## **B. Council of State's Delayed Embrace of Conformity Review**

The uninitiated in French judicial history will find it quite remarkable that the Council of State would only take up conformity review in 1989, fifteen years after Cassation's *Vabre* decision. Holding to the tradition that the administrative judge is not to review the validity of legislation, the Council of State refused to take this step even as other notoriously recalcitrant national courts in Europe—the German Federal Constitutional Court (1971) and the Italian Constitutional Court (1984)—had finally accepted setting aside domestic statutes contrary to Communitarian law.<sup>67</sup> However, the

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<sup>62</sup> See *infra* note 64.

<sup>63</sup> *Id.* (Opinion of the Advocate General)

<sup>64</sup> Case 6/64, *Costa v. Enel*, 1964 E.C.R. 585 (holding that "the transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty [of Rome] carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.") ("*Costa*"); Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337 (holding that, just as regulations, directives "are directly applicable and, consequently, may by their very nature have direct effects," in Member states' national legal orders.) ("*Van Duyn*").

<sup>65</sup> *Vabre* (Opinion of the Advocate General).

<sup>66</sup> See *id.* (Judgment of the Court).

<sup>67</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jun. 9, 1971, 31 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 145 (F.R.G.) (holding that ordinary "German courts must also apply legal provisions which, though attributable to an autonomous sovereign power outside the State, do nevertheless on the basis of their interpretation by the [ECJ] develop direct effect within the State and override and displace contrary national law."); S.p.a.



case for change would become yet more compelling in 1988, when the Constitutional Council itself, exercising its sole "as applied" jurisdiction as France's electoral Supreme Court (article 59), held that a French statute (the Act of July 11, 1986) conformed with Protocol No. 1 of the European Convention on Human Rights, thereby engaging in conformity review.<sup>68</sup> All these developments left the Council of State no other option but to break with tradition.

The opportunity for change presented itself in a challenge to the conduct of European Parliament elections by two French voters, Messrs. Nicolo and Roujansky.<sup>69</sup> Specifically, the plaintiffs contested the participation of French citizens from the overseas departments in the election of representatives to the European Parliament based on an interpretation of a French statute (the Act of July 7, 1977) that would bring it into conflict with article 19 of the Treaty of Rome. Patrick Frydman, a mid-level officer in the Council of State (*Maître de requettes*), appearing as Solicitor in the case (*Commissaire du Gouvernement*),<sup>70</sup> called the Justices to uphold the Treaty of Rome over subsequent national law on the theory that article 55's supremacy language "necessarily enable[d] the courts, by implication, to review the compatibility of statutes with treaties."<sup>71</sup> Frydman reasoned that article 55 "establish[ed] a system of priority for different rules," and thus was "addressed primarily to the courts."<sup>72</sup> He assured the Justices that, in giving the Treaty precedence over later statutes, they would not abolish legislative supremacy completely, for such review "relate[s] only to reviewing compatibility of statutes with treaties."<sup>73</sup> Thus, Frydman's argument for conformity review was premised on a different supremacy rationale: unlike Touffait's concurrent supremacy theory, his was an argument for upholding the Treaty of Rome *as a matter of French* (constitutional) *law*.

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Granital v. Amministrazione delle Finanze dello Stato, Corte costituzionale, 8 jun. 1984, n.170, Guir. It., I, 1521 (holding that "conflicting provisions in a national statute cannot constitute an obstacle to the recognition of the binding force conferred by the Treaty [of Rome] on Community regulations as a source of directly applicable rules.").

<sup>68</sup> See *Assemblée nationale, Val-d'Oise* (5ème circ.), CC decision no. 88-1082/1117, Oct. 21, 1988.

<sup>69</sup> See *Raoul Georges Nicolo*, Council of State, Ass., R.F.D.A. 1989, 813 (Oct. 20, 1989) ("*Nicolo*").

<sup>70</sup> Since February 2009, the official designation for the post of Solicitor at the Council of State has changed from *Commissaire du Gouvernement* to *Rapporteur public*. See Décret n° 2009-14 du 7 janvier 2009 relatif au rapporteur public des juridictions administratives et au déroulement de l'audience devant ces juridictions, JORF n°0006 du 8 janvier 2009 page 479, texte n° 8, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020046644&dateTexte=&categorieLien=id>.

<sup>71</sup> *Nicolo*, R.F.D.A. at 813 (Opinion of the Solicitor).

<sup>72</sup> *Id.* This rationale for conformity review closely tracks Justice Marshall's Supremacy-Clause-inspired rationale for judicial review. See *Marbury*, 5 U.S. at 178-79.

<sup>73</sup> *Nicolo*, R.F.D.A. at 813 (Opinion of the Solicitor).

Seeking to end its isolation in Europe and among the French Courts, the Council of State seized upon this opportunity and embraced conformity review by holding that the French electoral statute did not violate the Treaty; doing so, however, pursuant to the authority deemed implicit under article 55.<sup>74</sup> With legislative supremacy now a part of the past—at least with respect to treaty-law—the Court positioned itself to shape Communitarian law and, thus, participate in a process that had been in operation for more than three decades. Viewed in this perspective, *Nicolo* was as revolutionary as it was reactive. It was part of a phenomenon taking place throughout Europe, where national courts, operating under the growing pressure of ECJ and ECHR precedent, sought to secure a role in the evolution of European law so as to, in the words of Frydman, "break their monopoly."<sup>75</sup>

### C. Conformity Review Resurfaces in the Constitutional Council

Facing similar external and internal pressures, but lacking "as applied" authority (except on electoral law) per *IVG*, the Constitutional Council's ability to participate in the interpretation of European law in France was quite restricted. In fact, the adoption of conformity review by the other French High Courts might have delayed the arrival of concrete (i.e., ex post) constitutional review in France, the other method through which the Council could potentially influence the interpretation of French law vis-à-vis France's European commitments. In fact, as Cassation and the Council of State grew accustomed to reviewing the compatibility of French statutes with European law, which itself had been incorporating fundamental rights through ECJ and ECHR adjudication (which often targeted national laws), a form of *de facto*, "as applied" constitutional review came into existence in France.<sup>76</sup> For instance, in the year 2001 alone, the Council of State entertained over 2,000 challenges to the conformity of domestic measures to the European Convention of Human Rights.<sup>77</sup>

Still, in the realm of abstract (i.e., ex ante) constitutional review, the Council had some room to maneuver to become a relevant player in interpreting EU law in France. Yet, doing so without reversing *IVG*—and thereby incurring the heavy administrative burdens that it had originally sought to avoid—was the challenge. The Council would finally accomplish this feat in 2004, by embracing a nuanced (not surprisingly) version of conformity review, engineered through a measured withdrawal from *IVG*'s extreme position.<sup>78</sup> A group of opposition Deputies and Senators referred a bill that, among other things, transposed an EU directive (No. 2000/31/CE, July 8, 2000) and regulated several

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<sup>74</sup> See *Nicolo*, R.F.D.A. at 813.

<sup>75</sup> *Id.* (Opinion of the Solicitor).

<sup>76</sup> For a discussion on the growing constitutional nature of ECJ and ECHR review through fundamental rights adjudication, see SWEET, *supra* note 18.

<sup>77</sup> OLIVIER DUTHEILLET DE LAMOTHE, CONSTITUTIONAL REVIEW AND CONVENTIONAL REVIEW 1, 9 (2008) (The Honorable Olivier Dutheillet de Lamothe, writing then as an Associate-Justice (*Membre*) of the Constitutional Council, has recently retired after serving two terms in the Court). The reader is reminded that review pursuant to the Convention is outside the scope of this article.

<sup>78</sup> See *Economie numérique*.

aspects of electronic commerce and messaging. They challenged that, as written, the bill violated the constitutionally protected rights of privacy and individual freedom of communication (article 34).<sup>79</sup> Article 88-I—the product of the 1992 constitutional reform that ratified the Treaty on European Union—had promoted the incorporation of EU law in the French legal order. In it, the Council found a specific, novel constitutional authorization for reviewing the conformity of transposing laws to directives, on the theory that the obligation to "transpos[e] . . . results from a *constitutional* requirement."<sup>80</sup> Accordingly, the Council announced it would now engage in conformity review, even when seized under article 61, a clear departure from *IVG*. Only this time, article 88-I's specific bestowal of supremacy on EU law would provide the rationale, not article 55, as that path remains foreclosed by the portion of *IVG* that still governs.<sup>81</sup>

The Council was extremely careful in establishing the scope of this nascent review. Specifically, by construing its role under article 88-I as solely that of a guardian of the constitutional obligation to transpose, the Council ensured that it would only exercise review over one type of national norm: laws of transposition. This meant that bills not expressly designed to accomplish transposition, yet somehow conflicting with existing directives, would not be reviewed. Under the Council's narrow interpretation, the nonconformity of a law, other than a law of transposition, was not a violation of article 88-I's constitutional requirement of transposition. Yet, as Parliament enacts several laws every year, which may overlap with existing directives, deciding to skip review of laws not of transposition, while not an oversight, is a significant abdication of jurisdiction. Moreover, the Council also declined jurisdiction to consider referrals challenging legislative provisions that do no more than transpose the "direct, necessary and precise" effects of a directive,<sup>82</sup> apparently on the belief that the routine job of assuring that national measures give direct effect to secondary Communitarian law falls on ordinary French judges in their role as Communitarian law judges.<sup>83</sup> Thus, the Council limited the scope of its own conformity review to (i) ruling on the conformity of *bills expressly designated as laws of transposition*; and, as to this particular type of bill, (ii) examining *nontrivial questions* pertaining to their constitutional duty to transpose.

Yet, even as the Council recognized transposition as a constitutional obligation, it made another important reservation: transposing bills that violate "express constitutional provisions,"<sup>84</sup> or principles "inherent to the constitutional identity of France,"<sup>85</sup> would be

<sup>79</sup> *See id.* (*considérants 4 & 6*).

<sup>80</sup> *Id.* (*considérant 7*) (emphasis added).

<sup>81</sup> *Compare IVG*, REC. 19 (*considérants 2 & 7*) with *Economie numérique* (*considérant 7*).

<sup>82</sup> *Economie numérique* (*considérant 9*).

<sup>83</sup> Pierre Mazeaud, L'ÉVOLUTION DE LA JURISPRUDENCE DU CONSEIL CONSTITUTIONNEL SUR LES LOIS DE TRANSPOSITION DES DIRECTIVES, L'ADMINISTRATION FRANÇAISE ET L'UNION EUROPÉENNE: QUELLES INFLUENCES? QUELLES STRATÉGIES, rapport public du Conseil d'Etat 398-99 (2007) (The Honorable Pierre Mazeaud, writing then as Chief-Justice of the Constitutional Council), available at [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/pdf/Conseil/20061215.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/pdf/Conseil/20061215.pdf).

<sup>84</sup> *Economie numérique* (*considérant 7*).

invalidated.<sup>86</sup> This meant that it placed secondary Communitarian law under the French Constitution, thereby underscoring the constitutional character of the Council's conformity review. In announcing this new version of conformity *qua* constitutional review, the Council managed to rebalance its powers to optimize several aspects of its role as a constitutional court in a changing European legal landscape. First, by reviewing only the most complicated questions regarding interpretation of laws of transposition, it did not greatly disturb the balance of power among French courts. Second, in narrowing the scope of review to such laws, it protected the twin policy aims of *IVG*, namely (i) focusing on its role as a constitutional reviewer; and (ii) controlling its docket in light of the time constraints under which it operates. Finally, in directly engaging with EU law, the Council furthered the process of EU legal integration, although it remained anachronistically beholden to the view that EU law owes its supremacy to its foundations in France's constitutional order.

That national courts would retain such views, even as the ECJ had long declared the (unconditional) supremacy and direct effects of EU law, is not surprising.<sup>87</sup> Other European national Courts had done the same.<sup>88</sup> Indeed, the adoption of such parochial conceptions of EU law supremacy is the result of historical judicial turf wars (*la guerre des juges*), with national courts reacting and adapting to the decline of national law as EU integration proceeds and the influence of ECJ jurisprudence grows. These "wars" are also responsive to another dynamic: the institutional rivalry among national High Courts. In this sense, the ready acceptance of conformity review by Cassation and its late, begrudging, adoption by the Council of State and the Constitutional Council are the result of a multi-causal, highly interactive process. Regardless of one's beliefs as to the relative contribution of external and internal factors to the emergence of conformity review in France, it seems clear that, among the three High Courts, Cassation was the only one to embrace a concurrent theory of EU law supremacy in France. Both the Council of State (article 55) and the Constitutional Council (article 88-I) firmly grounded their duty to ensure conformity solely on French Constitutional grounds. This article now attempts to empirically verify whether these Courts' different views on the status of Communitarian law result in different levels of directive enforcement in France.

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<sup>85</sup> See *Loi relative au droit d'auteur et aux droits voisins dans la société de l'information*, 2004-540 DC (July 27, 2006) (*considérant 19*).

<sup>86</sup> Chief-Justice Mazeaud suggested France's republican attachment to secularism (*laïcité*) is inherent to the constitutional identity of France. See Mazeaud, *supra* note 83 at 398-99.

<sup>87</sup> See, e.g., *Costa*, E.C.R. 585 and Case 92/78, *Amministrazione Delle Finanze Dello Stato v. Simmenthal Spa*, 1978 E.C.R. 629 (holding that Community law, from its entry into force, "renders automatically inapplicable any conflicting provision of . . . national law," and "that it is not necessary for . . . [national] courts to request or await the actual setting aside by the national [legislative or executive] authorities . . . [so as not to] impede the direct and immediate application of Community rules.") ("*Simmenthal II*").

<sup>88</sup> See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 29, 1974, 37 *Entscheidungen des Bundesverfassungsgerichts* [BVerfGE] 27 (F.R.G.) (*Internationale Handelsgesellschaft MBH v. Einfuhr- Und Vorratsstelle Für Getreide Und Futtermittel*) ("*Solange I*") (Germany); Corte costituzionale, 21 apr. 1989, n.232 ("*Fragd*") (Italy); STC, Dec. 13, 2004 (No. 1) (Spain).

#### IV. Data Description and Methodology

To test whether distinct theories of EU law supremacy lead to different levels of directive enforcement, I looked at quantifiable aspects of "directive cases" entertained by these parallel adjudicatory systems. These quantifiable aspects ranged from establishing the obvious, such as determining whether a directive was enforced, to coding for more intricate variables, such as the type of national measure invoked (e.g., law of transposition, etc.), the case's subject matter, the reasons for non-enforcement of a directive (e.g., out of scope, procedural impediments, etc), whether the referral of a preliminary question to the ECJ was requested or granted, the status of the litigants (e.g., private party or government), etc. I coded for these other variables to detect whether differences in directive enforcement, if any, might be related to differences in these Courts' dockets (mainly Cassation and Council of State),<sup>89</sup> rather than differences in their stated views on EU law supremacy. For instance, a substantial portion of Cassation's civil and commercial docket involves private litigation. This can never occur in litigation before the Council of State, France's Supreme Administrative Court, where the government is invariably a litigant.<sup>90</sup> In sum, coding for litigant status allowed me to compare private party vs. government litigation (or vice-versa) in both Courts to ensure that any difference that I might detect on the treatment of directives is not attributable to differences in the type of litigants appearing before them.

##### A. Defining a Directive Case

So far, I have used the term "directive challenges" to describe conformity cases before France's three High Courts. In reality, I looked at more than just challenges involving the conformity of national law to directives. I looked at *all cases* where a litigant or a court, *sua sponte*, invoked both directives and national law in some manner. Specifically, the point was to cover (i) direct conformity challenges of the type "directive says X, national measure says Y (i.e., where Y somehow contradicts X), therefore enforce X," (think intersecting circles in a Venn Diagram); (ii) claims for parallel enforcement, as in "both directive and national measure say X, therefore enforce X" (think concentric circles in a Venn Diagram); and (iii) situations where, depending on how the Court rules on scope, "X displaces Y (or vice-versa)" (think separate, non-overlapping circles in a Venn Diagram). This broad definition avoids under-inclusiveness, reduces complex boundary issues (but does not eliminate them completely as I discuss later) and ensures that the entire universe of directive conformity review is captured regardless of the argument made or final determination reached.

##### B. Data and Methods

###### 1. Period of Study

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<sup>89</sup> The focus on Cassation and the Council of State in this empirical section owes to the fact that the Constitutional Council has entertained only 8 conformity review referrals since its June 10, 2004 *Economie numérique* decision. See *infra* note 94.

<sup>90</sup> For the reasons adduced in Parts II and III.C, the government is also always a litigant before the Constitutional Council.

I collected data covering completed results of conformity review in the period from October 20, 1989 to December 31, 2008. The reader will recall the initial date as the day the Council of State announced its *Nicolo* decision. That choice owes to the fact that any comparison between the two French Courts that have handled the bulk of conformity review cases (i.e., Cassation and Council of State) should begin only on or after the second has embraced conformity review. Indeed, going back to 1975 would produce uninteresting results: the Council of State would unequivocally and unfairly appear as Europhobic merely due to its initial fourteen-year reluctance to overcome legislative supremacy and review national laws.

## 2. The Data

The three main sources of primary data were (1) the *LamyLine Reflex* database, a French commercial subscription service containing French High Court reported decisions; (2) the *Legifrance* Website, a government-funded legal Website; and (3) the Websites and Intranet databases of Cassation,<sup>91</sup> Council of State<sup>92</sup> and Constitutional Council.<sup>93</sup> The combined use of these databases allowed me to focus my search on directive cases, as described above, and ensured that, through different research queries, I captured the entire population of directive cases adjudicated in these Courts.

## 3. Assembling and Coding Cases

To avoid double-counting in situations where either Cassation or Council of State, in considering a case, referred a prejudicial question pertaining to the interpretation of a directive to the ECJ, I made sure that only the final Court decision, i.e., after ECJ input, counted as a case, despite being assigned a different decision number (i.e., *arrêt* and *pourvoi*, in Cassation and Council of State, respectively). Obviously, the ultimate variable of interest in this study is each Court's level of directive enforcement, which I calculated from the universe of directive cases they entertained. A directive is enforced any time a party (or Court) invokes its application and the Court either expressly or implicitly relies on it as it announces its decision. Because of the formulaic, non-narrative style of French opinion writing, I had to check the final holdings of some especially difficult implicit-enforcement cases against the opinions of either Advocate General (Cassation) or Solicitor (Council of State) to finally ascertain whether a directive was enforced or not. I also used this procedure to clear up questions with respect to the other variables of interest in the study.

## V. Results and Analysis

As hypothesized earlier, should the conventional wisdom on how the French High Courts approach EU law be correct, one would observe different rates of directive

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<sup>91</sup> I thank Isabelle Goanvic, Councilor (*Conseiller référendaire*) and Assistant Director of the Documentation Section at Cassation for helping me with research on the Court's Intranet.

<sup>92</sup> I thank Jacques Biancarelli, Councilor (*Conseiller d'Etat*) in charge of European Law at the Council of State for his research advice and for allowing me to use the Court's Intranet.

<sup>93</sup> I thank Lionel Brau, Director of the Library and Information Services Section at the Constitutional Council and Guy Cleret, Librarian, for their invaluable research assistance during my clerkship at the Council.

enforcement among them. Of course, the dearth of directive cases in the Constitutional Council (8 cases), due to its late embrace of conformity review and restrictive standing requirements, would not allow robust confirmation or refutation of the received view. Indeed, in all such cases, the Constitutional Council enforced the directive.<sup>94</sup> Table I presents the number of directive cases heard by the three High Courts. The greater number of Council of State and Cassation decisions explains why, from this point forward, my analysis focuses solely on the conformity cases they entertained. All tables and background information on statistical tests conducted are presented in the Appendix.

TABLE I: FRENCH HIGH COURTS' EU CONFORMITY REVIEW CASELOAD (1989-2008)

<i>Court</i>	<i>Number of Cases</i>
Constitutional Council (2004-08)	8
Council of State	465
Court of Cassation	462

**A. Do Cassation's and Council of State's Different Views on EU Law Affect the Likelihood of Directive Enforcement?**

A comparison of Cassation and Council of State directive enforcement rates (see Table A) reveals that, among Cassation's 462 cases, directives were enforced 88 percent of the time (407 cases), while 12 percent (55 cases) resulted in non-enforcement. Remarkably, Council of State review results were essentially the same: rounded enforcement/non-enforcement rates were 88 percent and 12 percent, respectively. These results show not only that the French Courts share a high rate of directive enforcement, but also that varying the reviewing Court has no impact on the likelihood of enforcement.

To discard the possibility that very small observed differences in raw percentages could still produce a statistically significant relationship between ADJUDICATING COURT and RATE OF DIRECTIVE ENFORCEMENT, I performed a Fisher's exact test. I obtained a *p* value that far exceeded .05 (two-tailed), and thus could not corroborate the conventional wisdom hypothesis that Council of State review is less likely to enforce directives than Cassation review. That the source of review has no impact on the rate of directive enforcement indicates that differences in these Courts' approach to EU law have not played a role in whether directives are effectively enforced. This major finding negates the anecdotal, no doubt historically influenced (see Part III), divergence theory.

<sup>94</sup> See *Loi relative aux organismes génétiquement modifiés*, Decision No. 08-564DC, June 6, 2008; *Loi relative au secteur de l'énergie*, Decision no. 543-06DC, Nov. 30, 2006; *Loi relative au droit d'auteur et aux droits voisins dans la société de l'information* Decision no. 546-06DC, July 27, 2006; *Loi pour l'égalité des chances*, Decision no. 535-06DC, Mar. 30, 2006; *Loi relative à la protection des personnes physiques à l'égard des traitements de données à caractère personnel*, Decision no. 499-04DC, July 29, 2004; *Loi relative à la bioéthique*, Decision no. 498-04DC, July 29, 2004; *Loi relative aux communications électroniques et aux services de communication audiovisuelle*, Decision no. 497-04DC, July 1, 2004; *Economie numérique*, *supra* note 59.

## **B. Effect of Differences in Cassation's and Council of State's Dockets**

### **1. Accounting for Litigant-Based Differences Between Cassation and Council of State**

In refuting the conventional wisdom, this study's major finding of similar rates of directive enforcement must be checked against the possibility that, by aggregating all cases each court handled, it ignored docket differences that might reveal how different attitudes toward EU law supremacy impact the rate of enforcement. For instance, a critic could object that such an aggregate comparison does not account for the fact that civil and commercial cases, much of which is private litigation, make up about 68 percent of Cassation's docket, whereas *all* litigation before the Council of State involves the government.<sup>95</sup> To account for this fact, I examined only private-to-government litigation in Cassation's docket and compared it to the Council of State's docket.

#### **a. Initial Results**

At first look, a comparison of the Courts' directive enforcement rates in private-to-government litigation does produce different results (see Table B1a). The reduction in Cassation's volume of adjudication pushes the RATE OF DIRECTIVE ENFORCEMENT up to about 95 percent (277 cases), which, compared to the 88 percent observed in the Council of State, supports the conventional wisdom. Moreover, a *p* value of .002 corroborates the hypothesis of a relationship between ADJUDICATING COURT and RATE OF DIRECTIVE ENFORCEMENT. This result casts a shadow of doubt over the earlier finding of no relationship reached by considering all cases. Therefore, I decided to investigate further to detect if some cause other than these Courts' different views regarding EU law supremacy might be responsible for this shift. I began by looking at the reasons for non-enforcement.

#### **b. A More Nuanced Look at Litigant-Based Differences: Enter the Out-of-Scope Justification**

##### **i. Finding Some Theoretical Hints**

In a study of ECHR decisions, James Sweeney argues that national courts' preferred justification for refusing to apply the Convention is to hold certain situations as factually falling outside the scope of the Convention or ECHR jurisprudence, even when a Convention provision is on point.<sup>96</sup> Sweeney theorizes that, in recognition of the Contracting Parties' "diverse political cultural backgrounds and traditions,"<sup>97</sup> the ECHR

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<sup>95</sup> I obtained this percentage by averaging Cassation's volume of civil and commercial cases as a proportion of total cases for 2006 and 2008, which I chose at random. See C. CASS. RAPPORT ANNUEL (2008) pt. 5, at 371; *id.* (2006) pt. 5, at 475. Criminal prosecutions are the other category of cases in its docket. In such cases, the state is represented by independent prosecuting magistrates (i.e., *ministère public* or *parquet*) who "supervise the preliminary police investigations" and ensure the proper exercise of the state power to prosecute and restrict the liberty rights of the accused. See KNAPP & WRIGHT, *supra* note 34 at 397.

<sup>96</sup> James Sweeney, *Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era*, 54 INT'L & COMP. L.Q. 459, 462 (2005).

<sup>97</sup> *Id.* at 463.



tolerates this practice and affords domestic courts some measure of discretion so that "they can balance for themselves conflicting public goods" in areas implicating major domestic public policy.<sup>98</sup>

A similar version of this "margin of appreciation" argument appears in Xavier Groussot's analysis of the relationship between EU law and French public law. Groussot argues that, unlike Cassation, which does not hesitate to apply "general principles of Community law to obligations resulting [purely] from internal law," the French "administrative courts generally refuse to apply the general principles in purely internal matters."<sup>99</sup> He explains that, in the Council of State's view, general principles of EU law "only apply in the national legal order when the situation falls within the scope of Community law."<sup>100</sup> As an illustration, he suggests and cites to recent opinions where the Council of State only applied the general EU law principle of legitimate expectations in situations coming squarely within the subject matter of a particular directive.<sup>101</sup>

This makes sense, for administrative review in France has traditionally had a narrow focus, due to administrative judges' restrictive views of their role as mere adjudicators of the legality of administrative acts for *excès de pouvoir* (i.e., *ultra vires* review under strict objective legality).<sup>102</sup> Clearly, French administrative judges are not at all comfortable with the indefinite, loose-form method of review that is required to give effect to the more subjective legitimate expectations principle. Groussot believes that unease with this "far too indefinite"<sup>103</sup> Communitarian law principle is behind the Council of State's insistence on "a clear dichotomy between . . . internal law and matters falling within the scope of Community law."<sup>104</sup> If Groussot is right, the Council of State's resistance to conducting a broader form of review might explain its lower rate of directive enforcement. More importantly, that would renew doubts as to the validity of the conventional wisdom: for if differences in the Council of State's and Cassation's own margins of appreciation explain their different rates of directive enforcement in private-to-government adjudication, then adherence to different supremacy theories cannot take all the credit.

## ii. Adjusting Litigant-Based Equalization for Margin of Appreciation Differences

To account for this "margin of appreciation effect," I eliminated all non-enforcement decisions premised on out-of-scope justifications from both Cassation and

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<sup>98</sup> *Id.* at 462. Lupu and Voetten make a similar point in *THE ROLE OF PRECEDENT AT THE EUROPEAN COURT OF HUMAN RIGHTS: A NETWORK ANALYSIS OF CASE CITATIONS* at 5-6, *supra* note 18.

<sup>99</sup> Groussot, *supra* note 22 at 35.

<sup>100</sup> *Id.* at 39.

<sup>101</sup> *See id.* at 39-40 and accompanying note 163.

<sup>102</sup> *See* L. NEVILLE BROWN & JOHN S. BELL, *FRENCH ADMINISTRATIVE LAW* 203-04 (4<sup>th</sup> ed. 1993).

<sup>103</sup> Groussot, *supra* note 22 at 40.

<sup>104</sup> *Id.* at 39.

Council of State datasets. This is justified because adherence to different scope-of-review theories will affect whether and how often a Court refuses to enforce a directive on out-of-scope grounds. Also, a Court's refusal to enforce a directive on out-of-scope grounds is not technically a decision that national law trumps the directive, but a statement that the directive simply cannot apply to a particular factual situation presented in the case. Thus, removing out-of-scope cases from the dataset should provide a better comparison between these two Courts when one considers the litigation involving the same types of litigants (i.e., private parties and government). Furthermore, removing out-of-scope decisions seems justified in light of the broad approach I took when assembling both "directive case" databases (see discussion in Part IV.A above). Because I included *all cases* where a litigant invoked both directives and national measures in some manner, I may have included cases where the connection between directives and national measures is remote at best. Therefore, removing out-of-scope cases should improve the quality of the data while at the same time addressing the potential effect of non-supremacy-motivated differences in margins of appreciation.

Comparing the Courts' directive enforcement rates in private-to-government litigation without the out-of-scope cases in the data produced a remarkable result: the equalization of litigant composition in Cassation and Council of State adjudication no longer has any impact on the RATE OF DIRECTIVE ENFORCEMENT. That is, the Courts' enforcement rates are now virtually the same (see Table B1b). The new comparison shows that, among Cassation's 286 "private party vs. government cases," directives were enforced 97 percent of the time (277 cases), while only 3 percent (9 cases) resulted in non-enforcement. Remarkably, Council of State review results were essentially the same: rounded enforcement/non-enforcement rates were 96 percent (407 cases) and 4 percent (15 cases), respectively. To check if these slight differences in raw percentages amount to a statistically significant relationship between ADJUDICATING COURT and RATE OF DIRECTIVE ENFORCEMENT, I performed a Fisher's exact test. Statistical testing ( $p$  value approximately .835, two-tailed) refuted this hypothesis. Clearly, adjusting the litigant-equalization table (Table B1a) for traditional scope-of-review differences between the two Courts (Table B1b) reveals that ADJUDICATING COURT has no impact on RATE OF DIRECTIVE ENFORCEMENT.

Again, this result discredits the anecdotal perception of a difference between the two Courts grounded on their different views on EU law supremacy. While one could hypothesize that the Council of State's EU law supremacy views might themselves influence its more restrictive approach to the scope of administrative review, it can hardly be denied that it adopts the same approach throughout its non-European jurisprudence. History clearly shows that is the case. Simply put, the supremacy argument explains too much. Thus, after careful reflection, once differences in the status of litigants before these Courts are accounted for, one still cannot confirm the conventional view.

## **2. Accounting for Differences in Domestic Laws Invoked Before Cassation and Council of State**

A closer look at the kinds of national measures (e.g., laws of transposition, decrees, regulations, acts, etc.) invoked in directive cases before the two Courts reveals a much lower frequency of adjudication involving laws of transposition before the Council of State. After excluding out-of-scope litigation for the reasons discussed in the prior

section, I found that while Cassation entertained 156 cases involving laws of transposition, the Council of State entertained only 40 such cases (see Table B2a). Because conformity review involves the possibility of setting aside different kinds of national measures contrary to EU directives, and because the Council of State has seen adjudication involving laws of transposition much less frequently, one might question the appropriateness of comparing the two Courts' dockets, never mind reaching conclusions that refute received views.

Before addressing this question empirically, it is important to realize why this objection is not dispositive on theoretical grounds. The Council of State, in its concurrent consultative, non-judicial capacity as advisor to the Parliament and government, analyzes every piece of legislation proposed by the latter for conformity with French laws and international commitments.<sup>105</sup> In this consultative role, it conducts a formal prescreening of every bill thus submitted, including proposed laws of transposition. This separate reviewing process tends to eliminate flagrantly violating laws,<sup>106</sup> which likely reduces the *number* of transposing laws that will trigger future litigation. This might explain why, in its "judicial" capacity, the Council of State entertains conformity challenges to laws of transposition less frequently than Cassation, which has no consultative and hence no prescreening role.<sup>107</sup>

Still, to respond to this challenge empirically, I segregated conformity adjudication before these Courts into two tables: one considering solely law-of-transposition cases (see Table B2a), the other considering challenges to all other national measures (see Table B2b). Looking solely at law-of-transposition adjudication, I found that Cassation enforced directives 97 percent of the time (152 cases), while the Council of State did so a bit less frequently, in approximately 93 percent of the cases (37 cases) (see Table B2a). To check if this slight difference is statistically significant, I conducted a Fisher's exact test and obtained a *p* value that exceeded .05 (two-tailed). Therefore, there is no statistical difference in the RATE OF DIRECTIVE ENFORCEMENT between Cassation and the Council of State when conformity cases involving laws of transposition are considered alone. In sum, whether adjudicating private rights (*droit subjectifs*) (Cassation) or the legality of administrative acts (*légalité*) (Council of State), when considering the conformity of laws of transposition to directives (*conformité objective*), each Court is just as likely to enforce directives as the other.

Next, I checked directive enforcement rates in adjudication involving all other types of laws (Table B2b). The elimination of law-of-transposition cases from both dockets appeared to strengthen the case for convergence between the two Courts. In Cassation, the RATE OF DIRECTIVE ENFORCEMENT was about 96 percent (255 cases), which, compared to the 97 percent (370 cases) rate observed in the Council of State,

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<sup>105</sup> See 1958 CONST., art. 39 and BROWN & BELL, *supra* note 102 at 61-62.

<sup>106</sup> I say "tends to" because the government can still submit a bill that does not conform to "the modifications suggested by the Conseil d'Etat." *Id.* at 61.

<sup>107</sup> Note that the decrease in the *number* of transposing laws likely to be adjudicated before the Council of State says nothing about the *strength* of as-applied challenges to the promulgated versions of such laws. I discuss the broader case selection issue in the next subsection.

would suggest that the latter Court is slightly more likely to enforce directives in such cases. However, a *p* value of .666 (two-tailed) shows that the effect of ADJUDICATING COURT on RATE OF DIRECTIVE ENFORCEMENT is but the result of random chance and, thus, cannot be corroborated. This result, again, shows that the Courts have converging high rates of directive enforcement, despite adhering to different theories of EU law supremacy. More broadly, differences in the volume and types of laws they review are not significant barriers to comparing how they adjudicate cases.

### 3. Case Selection

Because, under the conventional view, the Council of State is perceived as less deferential to EU law, one may question whether private parties file challenges only when EU directives clearly trump national law, thus accounting for the Council of State's high enforcement rate. Indeed, if fewer challenges to national laws mean only stronger cases are being pursued at the Council of State, the lack of difference in the RATE OF DIRECTIVE ENFORCEMENT between the two High Courts could be a result of case selection,<sup>108</sup> rather than an indication of similar deference to EU law. Arguments for the existence of a selection effect in the context of Council of State review fail for at least two reasons. First, Council of State adjudication is only concerned with cases involving individual or collective organizations *resisting* some kind of administrative action. The perception of less deference to EU law alone is unlikely to keep these litigants from seeking redress through the administrative courts when they know they are not likely to get any meaningful relief unless they sue.<sup>109</sup> Simply put, the existence of "might have been" plaintiffs is inconsequential in this context. Second, private litigants realize that having the Council of State hear their conformity challenges places them in very favorable position since, pursuant to Treaty of Rome article 234, national courts of last resort are *required* to refer nontrivial questions regarding EU law interpretation to the ECJ. This implies that, by the time Council of State review occurs, every strong (i.e., trivial) case for either type of litigant has already been disposed of, meaning that, if anything, Council of State review is much more likely to involve "harder" cases, the opposite of case selection. Thus, the conventional view is not likely affecting litigants' decisions to file conformity challenges in the administrative courts or appeals to the Council of State.

### C. Reconciling the Reality and Perception of EU-Conformity Review

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<sup>108</sup> See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 18 (1984).

<sup>109</sup> In stark contrast to administrative adjudication, the state may appear before Cassation in a different posture. In civil cases, it often appears as a common tort litigant, i.e., as a *sujet des droits*, as if it were a private party having no general claim to sovereign immunity (unlike the state under the U.S. common law system). See Stanwood R. Duval, *Sovereign Immunity, Anachronistic or Inherent: A Sword or a Shield*, 84 TUL. L. REV. 1471, 1476-77 (2010). However, selection is also unlikely in Cassation's civil cases, where there are alternative means of relief other than litigation, because stronger cases are more likely to be settled or dismissed earlier, leaving only the "harder" cases to final adjudication. Obviously, selection does not occur if private litigants perceive Cassation as a more EU-deferential Court.

Without question, Cassation's *Vabre* (1975) and Council of State's *Nicolo* (1989) announced not only that French "judicial" Courts would review French statutes for conformity with EU law, but created, based on each Court's different justification for doing so (see Part III.A & B), the perception that one (Cassation) would be more deferential to the EU legal order than the other (Council of State). At first look, the formation of such a perception in the past appears reasonable. Indeed, expressly accepting enforcement of EU law as concurrent authority and as soon as the opportunity presented itself (Cassation) is quite different from doing so 15 years later, and only as a matter of national constitutional law (Council of State).

Yet, Cassation's early advance into conformity review occurred largely because most of its docket involves civil and commercial litigation (about 70 percent),<sup>110</sup> making it less likely to implicate, and thus potentially displace, major public policy choices embedded in domestic mandatory law (*droit public*), the domain of Council of State adjudication. Certainly, legislative sovereignty had a different weight to the two Courts. Moreover, as far as conformity is concerned, the Council of State remained a player on EU law conformity discussions even during the 1975-89 period, when, in its consultative capacity, it could affect the lawmaking process. Still, these differences merely explain why the Council of State waited 15 years longer than Cassation. They cannot explain why or how, once embracing conformity review, even if under a different theory of EU law supremacy, the Council of State, in its judicial capacity, would behave any different than Cassation. After all, once they accepted to conduct conformity review, they both had to act as courts of law in the task of ensuring conformity, which, by its name, mandates deference to supranational law. Thus, whether the Treaty of Rome had created a "separate legal order" having concurrent authority (*Vabre*) or controlled only by virtue of article 55's treaty supremacy clause (*Nicolo*), EU directives were to be enforced, period. That the evidence of convergence demonstrates that Cassation and the Council of State have acted alike, despite their different foundational views, should not be a surprise. Rather, the lack of empirical studies on conformity and the literature's focus on the few instances of non-enforcement<sup>111</sup> might explain the persistence of anecdotal perceptions.

### **1. What Can and Cannot Be Learned from Each Court's Record of ECJ Referrals**

An alternative, more straight-forward way of detecting differences in the way the two Courts approach EU law might be to check whether they differ in their compliance to article 234's (Treaty of Rome) obligation to refer EU law questions to the ECJ. Clearly, if one Court uses the referral procedure much more often than the other, one could surmise that it does so because it is more willing to perform the role of ordinary judge of Communitarian law than the other. Arguably, more frequent referrals by one Court would imply that its judges are not only more willing to apply but are also more concerned with uniform application of EU law than judges in the other. Such deference is normally what one would expect from ordinary judges of Communitarian law vis-à-vis their supreme court, the ECJ.

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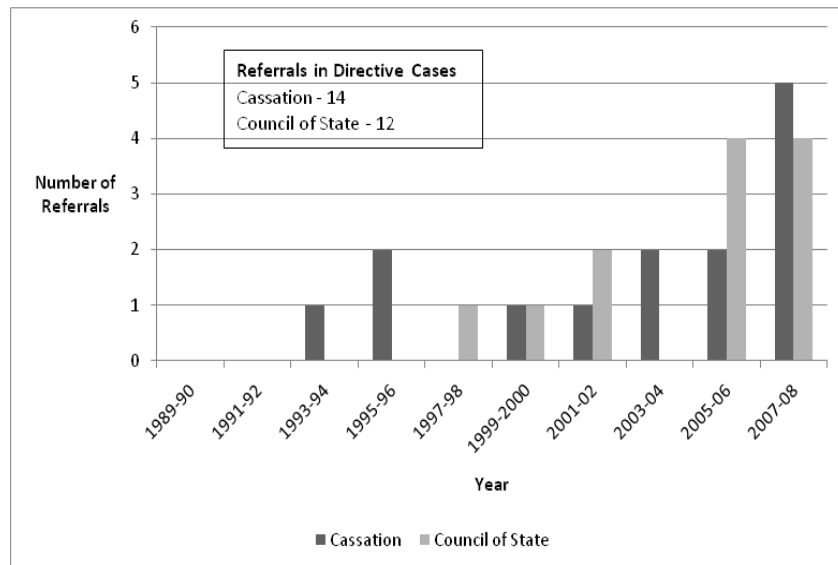
<sup>110</sup> See discussion in Part V.B1 and note 95 *supra*.

<sup>111</sup> Table C1a provides a list detailing the stated reasons for non-enforcement in conformity adjudication before both Courts.

To contextualize this comparison, however, one needs to understand how French courts compare with courts of other EU members. Despite a late start in conformity review by the Council of State, among all EU members, France ranks third (755 referrals) in the cumulative number of referrals (i.e., 1952-2008) to the ECJ. Only Germany (1672 referrals) and Italy (978 referrals) rank higher.<sup>112</sup> Counting solely referrals by the two Courts (lower courts can also refer questions under article 234), Cassation, with a 15-year head start, has referred questions 83 times while the Council of State has done so on 42 occasions. However, if one takes 1989 as the base year, the total number of referrals up to 2008 is 46 for Cassation and, obviously, 42 for the Council of State.<sup>113</sup> The numbers are again very similar, but, of course, not all these referrals presented questions regarding secondary EU law, the focus of this study.

While coding for "directive cases" in the French High Courts, I also took note of their respective number of referrals. Due to the Constitutional Council's extremely brief deliberation period (30 days), they obviously cannot wait for an ECJ answer, so they have referred no questions. Conversely, Cassation and the Council of State, as ordinary Community law courts, do not operate under such constraints and have referred 14 and 12 questions regarding the interpretation of directives to the ECJ, respectively. Figure I reveals an alternating, yet balanced, pattern of referrals during the period of study.

FIGURE I: CASSATION AND COUNCIL OF STATE'S ECJ REFERRALS IN DIRECTIVE CASES (BIANNUALLY)



Once more, the data demonstrate great convergence among the two Courts. Not only are Cassation and Council of State close in their absolute number of referrals in directive cases, their relative percentages of directive-case referrals as a proportion of

<sup>112</sup> See COURT OF JUSTICE OF THE EUROPEAN UNION, ANNUAL REPORT (2008) 104-05.

<sup>113</sup> Compare *id.* at 104 with SYNOPSIS OF THE WORK OF THE COURT OF JUSTICE AND THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES IN 1988 AND 1989 AND FORMAL SITTINGS IN 1988 AND 1989, 41 (1990).

total referrals are also nearly identical, at 30 percent and 29 percent, respectively. A difference-of-proportions test demonstrates that this difference is not statistically significant (calculated  $p$  value of  $.89 > .05$  (two-tailed)).

Next, I investigated whether the Courts differed in the way they referred cases to the ECJ. Specifically, I looked at how often litigants and Courts, *sua sponte*, had been the original sponsor of referrals (see Table C1b). Plausibly, a greater frequency of *sua sponte* referrals might demonstrate a greater willingness to engage with the ECJ, thus revealing a stronger recognition of the latter's supremacy in declaring EU law. Although the small number of referral cases invites caution when considering these results, I found that, contrary to the conventional wisdom, the Council of State had a greater proportion of *sua sponte* referrals (67 percent or 8 cases) than Cassation (29 percent or 4 cases). However, this difference is not statistically significant ( $p$  value approximately .113, two-tailed), indicating that the Council of State is not more likely to refer, on its own volition, a directive case to the ECJ than Cassation.

Finally, I looked solely at litigant-initiated requests for ECJ referrals to investigate whether the Courts differed in their reactions to such requests (see Table C1c). Similar to the argument made in the previous paragraph, a Court's greater receptiveness to referral requests may well reveal its greater willingness to accept ECJ's input, an implicit recognition of the latter's role in spelling out supreme EU law. While the need for caution with the small numbers here still applies, I found that Cassation granted referral requests more than twice as often as the Council of State (69 percent compared to 33 percent, respectively). This difference, however, was not statistically significant ( $p$  value approximately .193, two-tailed), an indication that Cassation is no more receptive to this type of request than the Council of State. In sum, while in raw numbers, the Council of State seems more likely to refer cases on its own volition than Cassation, with the latter Court, in turn, being more likely to grant such requests when instigated by parties in litigation, neither of these relationships are statistically significant. On balance, these differences as to how referrals are channeled through to the ECJ are statistically meaningless and, even if significant, would at most offset each other. Thus, the data on referrals reveals what other tests in this study have already shown: the impossibility of distinguishing these Courts in their roles as ordinary courts of Communitarian law.

## **2. A Look at the Forest: Convergence in Annual Enforcement Rates**

After determining these Courts share high cumulative rates of directive enforcement—and even similar patterns of ECJ referrals—I examined whether their respective rates fluctuated over time (i.e., 1989-2008). Indeed, the use of percentages based on aggregate data could hide periods of wide fluctuation in the treatment of directive cases between the two Courts. Conversely, narrow fluctuations would tend to indicate uniform application of Communitarian law by France's bifurcated judiciary. Table II shows that, throughout the period of study, the Courts have steadily achieved high rates of directive enforcement, with the last seven-year period showing a slight downward trend in their enforcement rates. The division of the study into three roughly identical periods (of 7, 6 and 7 years) is, however, arbitrary and can be a bit deceptive since it ignores year-to-year fluctuations that, while not disrupting general trends, would require some explanation.

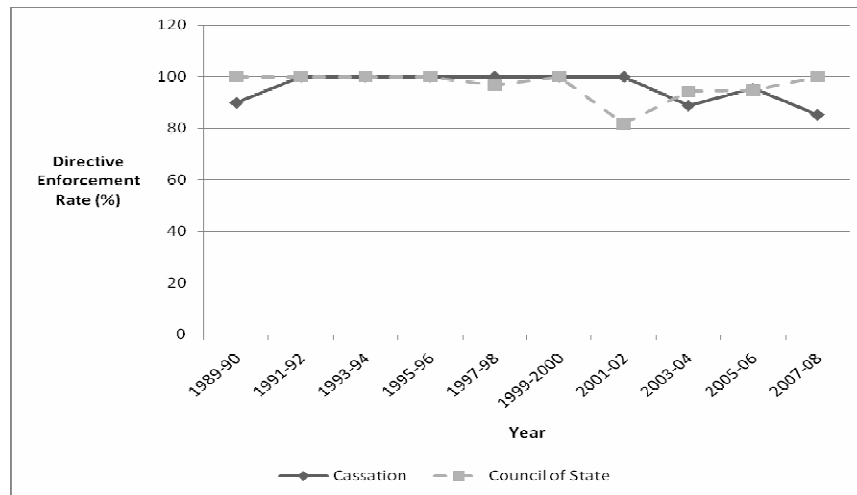
TABLE II: CASSATION AND COUNCIL OF STATE RATES OF DIRECTIVE ENFORCEMENT IN THREE PERIODS

<i>Court</i>	<i>1989 -1995</i>	<i>1996 - 2001</i>	<i>2002 - 2008</i>
Cassation	98% (57)	100% (199)	92% (165)
Council of State	100% (46)	97% (186)	95% (189)

Note: Number in Parentheses corresponds to total number of cases, excluding out-of-scope dismissals.<sup>114</sup>

To monitor eventual fluctuations and possibly identify their reasons, Figure II breaks down, biannually, the Courts' enforcement rates (excluding out-of-scope dismissals). A caveat is in order: one should approach year-to-year fluctuations in the enforcement rate with a bit of care for such fluctuations might be themselves the result of another spurious fluctuation: the much lower number of cases considered in a given year. With this caveat in mind, the first two years show an initial separation between Cassation's (90 percent) and Council of State's (100 percent) enforcement rates. This divergence, however, is nothing but the result of a single non-enforcement decision by Cassation in 1989, a year in which it considered but one directive case.<sup>115</sup> A period of converging, high enforcement rates then ensued and lasted until the end of 2000.

FIGURE II: CASSATION AND COUNCIL OF STATE RATES OF DIRECTIVE ENFORCEMENT (BIANNUALLY)



<sup>114</sup> I excluded out-of-scope dismissals from the pool of directive cases due to the Council of State's more restrictive approach to the scope of administrative review. See discussion in Part V.B.1.b.ii.

<sup>115</sup> See Cour de cassation Chambre commerciale et financière [Cass. com.] Apr. 25, 1989 Bull. civ., No. 626 (*Robert Willot Co., LLC v. Director General of Taxes*) (rejecting appeal on grounds that plaintiff's directive argument had been raised in an untimely fashion).



Council of State enforcement rates would drop to 83 percent in 2001 (10 of 12 cases) and 80 percent in 2002 (8 of 10 cases), while Cassation rates remained at 100 percent during the same period. The Council of State justified two of these non-enforcement decisions on seemingly appropriate grounds: political question<sup>116</sup> and prior tacit approval by EU officials of the French national measure at issue.<sup>117</sup> Yet, strikingly, on the other two decisions,<sup>118</sup> the administrative Court ruled against enforcement on grounds that the directive in question had not yet been transposed into a French national measure. Certainly, conditioning application of a directive on its domestic transposition constitutes a denial of EU law supremacy and direct effect.<sup>119</sup> Arguably, although reliance on this particular non-enforcement ground has occurred only four times (see Table C1a)<sup>120</sup> in 422 rulings (see Table B1b), this might explain the persistence of the perception that the Council of State is less likely to enforce directives, thus distorting its overwhelming record of faithfully applying Communitarian law.<sup>121</sup>

Following this brief divergence, Council of State and Cassation directive enforcement rates enter another period of convergence that lasts through 2007. Suddenly, Cassation's rate drops from 95 percent at the end of 2007 (19 of 20 cases) to 76 percent (16 of 21 cases) in 2008 (this drop, alone, explains the drop in the biannual period). In a set of actions for restitution of unduly paid taxes, plaintiffs argued that a provision of the French tax code (article 406 A of the *Code général des impôts*) violated certain EU directives (No. 1992/12/CE, Feb. 1992 and 1992/83/CE, Oct. 19, 1992) that exempted their productive activities from taxation.<sup>122</sup> They alleged the State's failure to timely

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<sup>116</sup> Conseil d'Etat [CE] [Council of State] May 11, 2001 Rec. Lebon (*L'Association pour le Respect du Site du Mont-Blanc*).

<sup>117</sup> Conseil d'Etat [CE] [Council of State] Oct. 11, 2001 Rec. Lebon (*France Nature Environment*).

<sup>118</sup> Conseil d'Etat [CE] [Council of State] Jun. 14, 2002, Rec. Lebon. ( *L'Association pour la Protection de L'Environnement du Val de Copponex*); and Conseil d'Etat [CE] [Council of State] Dec. 30, 2002 (*La Federation Nationale Des Transports Force Ouvriere UNCP*).

<sup>119</sup> See *Costa* 1964 E.C.R. 585; *Van Duyn* 1974 E.C.R. 1337; *Simmenthal II* 1978 E.C.R. 629.

<sup>120</sup> See CE Jun. 14, 2002 (*L'Association pour la Protection de L'Environnement du Val de Copponex*); CE Dec. 30, 2002 (*La Federation Nationale Des Transports Force Ouvriere UNCP*); Conseil d'Etat [CE] [Council of State] Apr. 07, 2006 Rec. Lebon (*Societe Phytoservice*); and Conseil d'Etat [CE] [Council of State] Nov. 05, 2003 Rec. Lebon (*le Syndicat de Defense de Promotion des Fabricants et Affineurs du Morbier*).

<sup>121</sup> Indeed, another empirical study has stated that individuals "tend to overestimate the frequency of memorable . . . events" and they may persist in "incorrect judgments in the face of inconsistent new information." Theodore Eisenberg & Stewart Schwab, *The Reality of Consitutional Tort Litigation*, 72 Cornell L. Rev. 641, 694 n. 217 (1987) (citation omitted).

<sup>122</sup> Cour de cassation Chambre commercial et financière [Cass. com.] Jul. 08, 2008 Bull. civ. No. 839 (*Boiron Co. v. Director General of Customs & Interregional Director of Customs for Rhone-Alpes-Auvergne*); Cour de cassation Chambre commercial et financière [Cass. com.] Jul. 08, 2008 Bull. civ. No. 838 (*Director General of Customs & Regional Director of Customs for Picardie v. Yves-Saint-Laurent Parfums Lassigny*); Cour de cassation Chambre commercial et financière [Cass. com.] Jul. 08, 2008 Bull. civ. No. 837 (*Boiron Co. v. Director General of*

implement the directive had forced them to pay the undue tax for which they sought restitution. Without examining the merits, Cassation rejected these five appeals on grounds that this was a matter for the administrative courts, not the judicial courts, and thus did not enforce the directive as requested. However, in refusing to enforce, Cassation did not assume a position of antagonism regarding EU law supremacy. It merely paid deference to the distribution of judicial business in France, which reserves "to the competence of the administrative courts the quashing or rectification of decisions . . . by authorities exercising executive power . . ." <sup>123</sup>

The preceding empirical and qualitative analysis shows that one can still make sense of longstanding perceptions of Cassation's and Council of State's relationship with EU law while refuting anecdotal impressions that such differing perceptions actually produce substantial differences in these Courts' decisions. Despite their different views on the relationship between EU law and national law, the data show that, during the period of study, they have acted as bona fide Communitarian law judges, enforcing directives at an overwhelmingly high rate, and referring questions pertaining to the interpretation of directives to the ECJ with similar enthusiasm. This does not mean that the two Courts' views have completely merged, however. Following the fault lines of the French bifurcated judiciary, the Courts will occasionally respond differently to the external influence of EU law. However, it is crucial to understand that occasional different responses are not necessarily reactions to or against EU law, but the result of a much more complex dynamic.

## Conclusion

Conformity (and conventional) review emerged in France as a solution to a profound impasse: ensuring compliance of national measures to France's growing international obligations—a constitutional requirement—while holding on to the notion that legislated law could not be called into question—a historical, political, even metaconstitutional principle. France's complex system of constitutional, judicial, and administrative "courts" gradually overcame this impasse in creative and different ways, often prodded by changes in the national and supranational legal landscape. In this process, the French High Courts took their cues from each other and from their supranational counterparts, participating in what came to be characterized as a *dialogue des juges*. This article investigated a number of contexts in which this judicial dialogue has taken place and demonstrated that Cassation and the Council of State, the two supreme courts that held the monopoly of as-applied review until quite recently, flourished as Communitarian law judges once they embraced conformity review.

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*Customs, Judicial Agent of Tresor*); Cour de cassation Chambre commerciale et financière [Cass. com.] Jul. 08, 2008 Bull. civ. No. 842 (*Diffusion of Perfume Products v. Director General of Customs, Interregional Director of Customs for Rouen*); Cour de cassation Chambre commerciale et financière [Cass. com.] Oct. 07, 2008 Bull. civ. No. 976 (*Yves Rocher Biology Labs v. Regional Director of Customs and British Indirects*).

<sup>123</sup> *Loi transférant à la juridiction judiciaire le contentieux des décisions du Conseil de la concurrence*, 1986-224 (Jan. 23, 1987) (*considérant 15*).

Not unlike the incremental, treaty-based approach to the creation of the Union, this process of judicial *bricolage* had unintended consequences. The most profound of these was the *de facto* death of legislative supremacy, as Cassation and the Council of State enforced directives, at times displacing non-conforming national statutes, an impossibility under France's Constitution. Due to a growing number of Cassation and Council of State referrals to the ECJ, the fate of French statutes, some involving constitutional-order questions, has been increasingly determined in terms of EU law in Luxembourg. While both the creation of as-applied constitutional review (July 2008) and the Constitutional Council's announcement of its first such decisions (May 2010) have "creat[ed] a link between the Council and the citizen,"<sup>124</sup> they can also be perceived as France's attempt at monopolizing the determination of constitutional-order questions. This shift, besides finally sealing the fate of legislative supremacy in France, is but the latest in a series of moves by national courts to "catch up" with the pace of European developments and the advance of the supranational courts.

Yet, this re-launch of constitutional review as a parallel review system will introduce a number of challenging "*Erie*-like" questions that will occupy the minds of French High Court Justices for years to come.<sup>125</sup> For instance, what happens when, in a challenge against national law, litigants call for invalidation simultaneously on "serious" constitutional (article 61-1) and Communitarian (Treaty of Rome, article 234) law grounds? Should Cassation and Council of State Justices refer questions to the Constitutional Council and ECJ simultaneously? What to do if the answers are inconsistent? Furthermore, should the Constitutional Council, in its role as guardian of the constitutional obligation to transpose (see Part V.C), refrain from reviewing the constitutionality of a law of transposition that merely gives direct effect to a directive and thus defer to the ECJ referral? Clearly, the side-by-side operation of as-applied review and the largely overlapping conformity review system will likely increase jurisdictional disputes, as all French High Courts play the dual role of national and Communitarian law judges. Ultimately, their decision on these choice-of-law issues will affect not only the rate of directive enforcement but how European judicial integration occurs in the years to come.

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<sup>124</sup> See Debré, *supra* note 34 at 19.

<sup>125</sup> Procedurally, the Council's *ex post* constitutional review of parliamentary acts takes the form of answers to preliminary questions (*questions prioritaires*) involving constitutional issues in concrete cases pending before the French judiciary. Constitutional Law no. 2008-724 of July 23, 2008 Modernizing the Institutions of the Fifth Republic, article 29 (providing the new text of article 61 of the French Constitution). The amended Article 61 does increase the jurisdiction of the French constitutional court beyond abstract review into concrete, "as-applied" review, but it also gives Cassation and the Council of State the important authority to decide which cases are worthy of referral. See 1958 CONST., art. 61-1 (as amended).

## APPENDIX

### French High Courts' Treatment of Directives under EU Conformity Review

#### I. Introduction and Methodology

This appendix presents results in two formats: (a) tables containing observed data, and (b) inferential statistical analysis. As far as the body of this article is concerned, tables are interpreted or read row-by-row from left to right. Thus, as I allow the independent variable to vary (e.g., *Court* in Table A), I can detect whether and how the dependent variable categories, displayed in each row, change based on their observed frequencies. Of course, to make the information in each cell comparable, each cell's absolute frequency is normalized by dividing it by its column total.

TABLE A: CONFORMITY REVIEW: FRENCH NATIONAL LAWS VS. EU DIRECTIVES  
(INCLUDING OUT-OF-SCOPE CASES)

		<i>Court</i>		Total
<i>Treatment of EU Directives</i>		Cassation	Council of State	
	Directive Enforced	407    88.10%	407    87.53%	814
	Directive Not Enforced	55    11.90%	58    12.47%	113
Total		462	465	n = 927

This is, however, a non-statistical method of evaluating the merits of research hypotheses. Given the format in which my data is organized, I use Fisher's Exact Test to determine the existence of a relationship between the dependent and independent variables.<sup>126</sup> This test also compares data from two dichotomous groups—Cassation and Council of State—to see whether their different impact on the two categories of the dependent variable is statistically significant. Once I calculate a *p* value, I compare it with the level of statistical significance, which is 0.05 in this study (two-tailed). If the calculated *p* value is less than this predetermined level, the null hypothesis is refuted and the research hypothesis is corroborated. The following table summarizes these steps.

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<sup>126</sup> Because this test has no formal test statistic or critical value, I derive my conclusions on statistical significance by comparing calculated probability values, not by comparing calculated and critical values. This test has the added advantage of giving *exact* rather than *approximate* *p* values.

## FISHER'S EXACT TEST CALCULATION FOR TABLE A

<i>Observed Frequencies</i>		<i>Associated p value</i>	
407	407		
55	58	$P_k + P_{k+1} + P_{k+2} \dots = 0.841$	> 0.05

(Level of statistical significance)

Because the calculated  $p$  value (0.841) is greater than the prespecified level of statistical significance, I cannot reject the null hypothesis of no relationship. This means that varying the Court has no effect on the treatment of directives.

In cases where I confirm the null, I conduct a post-hoc power analysis to assess whether Fisher's had a fair chance of rejecting the null. I use a 10 percentage point difference as the effect size, meaning that, given these populations (I am not using samples), I would have a chance of not less than  $(1-\beta)$  of detecting a 10 percentage point difference between one of the observed proportions and a theoretical proportion assumed to be 10 percentage points smaller.<sup>127</sup> The following table summarizes the power test (two-tailed,  $\alpha = 0.05$ ).

## POST-HOC POWER TEST CALCULATION FOR TABLE A

<i>Input</i>	<i>Output</i>
Observed Proportion = 0.8810	Power $(1-\beta) = 0.9822$
Theoretical Proportion = 0.7810	Actual $\alpha = 0.04568$
Populations 1 & 2 = (462, 465)	

These results show that, given these population sizes, I have about a 98 percent chance of detecting a difference of 10 or more percentage points in these Courts' rates of directive enforcement. Excepting Table C1a, which has more than four cells, and Table B1a, which refutes the null hypothesis, the remaining tables underwent a similar analysis.

<sup>127</sup> See generally Franz Faul et al., *Statistical Power Analyses Using G\*Power 3.1: Tests for Correlation and Regression Analyses*, 41 BEHAV. RES. METHODS 1149 (2009).

## II. Results and Statistical Comparison for Remaining Tables in Text

TABLE B1a: PRIVATE PARTY VS. GOVERNMENT CONFORMITY LITIGATION  
(INCLUDING OUT-OF-SCOPE CASES)

		<i>Court</i>		
		Cassation	Council of State	Total
<i>Treatment of EU Directives</i>	Directive Enforced	277 94.54%	407 87.53%	684
	Directive Not Enforced	16 5.46%	58 12.47%	74
Total		293	465	n = 758

## FISCHER'S EXACT TEST CALCULATION FOR TABLE B1a

<i>Observed Frequencies</i>		<i>Associated p value</i>	
277	407		
16	58	$P_k + P_{k+1} + P_{k+2} \dots = 0.002$	< 0.05 (Level of statistical significance)

TABLE B1b: PRIVATE PARTY VS. GOVERNMENT CONFORMITY LITIGATION  
(EXCLUDING OUT-OF-SCOPE CASES)

		<i>Court</i>		Total
		Cassation	Council of State	
<i>Treatment of EU Directives</i>	Directive Enforced	277 96.85%	407 96.45%	684
	Directive Not Enforced	9 3.15%	15 03.55%	24
Total		286	422	n = 708

FISCHER'S EXACT TEST CALCULATION FOR TABLE B1b

<i>Observed Frequencies</i>		<i>Associated p value</i>	
277	407		
16	58	$P_k + P_{k+1} + P_{k+2} \dots = 0.835$	> 0.05 (Level of statistical significance)

POST-HOC POWER TEST CALCULATION FOR TABLE B1b

<i>Input</i>	<i>Output</i>
Observed Proportion = 0.9685	Power (1-β) = 0.9988
Theoretical Proportion = 0.8685	Actual α = 0.0440
Populations 1 & 2 = (286, 422)	

TABLE B2a: LAWS OF TRANSPOSITION AND DIRECTIVE ENFORCEMENT  
(EXCLUDING OUT-OF-SCOPE CASES)

<i>Treatment of EU Directive</i>		<i>Court</i>		Total
		Cassation	Council of State	
<i>Treatment of EU Directive</i>	Directive Enforced	152      97.44%	37      92.50%	189
	Directive Not Enforced	4      02.56%	3      07.50%	7
Total		156	40	n = 196

## FISCHER'S EXACT TEST CALCULATION FOR TABLE B2a

<i>Observed Frequencies</i>		<i>Associated p value</i>	
152	37		
4	3	$P_k + P_{k+1} + P_{k+2} \dots = 0.152$	> 0.05
			(Level of statistical significance)

## POST-HOC POWER TEST CALCULATION FOR TABLE B2a

<i>Input</i>	<i>Output</i>
Observed Proportion = 0.9744	Power (1-β) = 0.6436
Theoretical Proportion = 0.8744	Actual α = 0.0350
Populations 1 & 2 = (156, 40)	



TABLE B2b: LAWS NOT OF TRANSPOSITION AND DIRECTIVE ENFORCEMENT  
(EXCLUDING OUT-OF-SCOPE CASES)

<i>Treatment of EU Directive</i>		<i>Court</i>		Total
		Cassation	Council of State	
<i>Treatment of EU Directive</i>	Directive Enforced	255 96.23%	370 96.86%	625
	Directive Not Enforced	10 03.77%	12 03.14%	22
Total		265	382	n = 647

## FISCHER'S EXACT TEST CALCULATION FOR TABLE B2b

<i>Observed Frequencies</i>		<i>Associated p value</i>	
255	370		
10	12	$P_k + P_{k+1} + P_{k+2} \dots = 0.666$	> 0.05
			(Level of statistical significance)

## POST-HOC POWER TEST CALCULATION FOR TABLE B2b

<i>Input</i>	<i>Output</i>
Observed Proportion = 0.9623	Power (1-β) = 0.9950
Theoretical Proportion = 0.8623	Actual α = 0.0435
Populations 1 & 2 = (265, 382)	

TABLE C1a: NON-ENFORCEMENT CASES

		<i>Court</i>		Total
		Cassation	Council of State	
<b><i>Stated Reasons for Non- enforcement</i></b>	Directive Out of Scope	41 74.55%	43 74.14%	84
	Avoiding Retroactivity	6 10.91%	1 01.72%	7
	Directive Not Yet Transposed	0 0.00%	4 06.90%	4
	Directive Struck Down by ECJ	2 03.64%	0 0.00%	2
	Procedural Impediments	6 10.91%	7 12.07%	13
	Law of Transposition Not Yet Enforceable	0 0.00%	2 03.45%	2
	Tacit Endorsement of National Law by EU Officials	0 0.00%	1 01.72%	1
Total		55	58	n =113

TABLE C1b: SOURCE OF REFERRALS TO ECJ

<i>Source</i>	<i>Court</i>		Total
	Cassation	Council of State	
Litigant Request	10 71.43%	4 33.33%	14
Sua Sponte	4 28.57%	8 66.67%	12
Total	14	12	n = 26

FISCHER'S EXACT TEST CALCULATION FOR TABLE C1b

<i>Observed Frequencies</i>		<i>Associated p value</i>	
10	4	$P_k + P_{k+1} + P_{k+2} \dots = 0.113$	> 0.05 (Level of statistical significance)
4	8		

POST-HOC POWER TEST CALCULATION FOR TABLE C1b

<i>Input</i>	<i>Output</i>
Observed Proportion = 0.7143	Power (1-β) = 0.0554
Theoretical Proportion = 0.6143	Actual α = 0.0300
Populations 1 & 2 = (14, 12)	

TABLE C1c: REFERRED REQUESTS AND DENIALS

<i>Litigant Requests</i>	<i>Court</i>		Total
	Cassation	Council of State	
Granted	10    69.23%	4    33.33%	14
Denied	12    30.77%	13    66.67%	25
Total	22	17	n = 39

FISCHER'S EXACT TEST CALCULATION FOR TABLE C1c

<i>Observed Frequencies</i>		<i>Associated p value</i>	
10	4		
12	13	$P_k + P_{k+1} + P_{k+2} \dots = 0.193$	> 0.05
			(Level of statistical significance)

POST-HOC POWER TEST CALCULATION FOR TABLE C1c

<i>Input</i>	<i>Output</i>
Observed Proportion = 0.6923	Power (1-β) = 0.0735
Theoretical Proportion = 0.5923	Actual α = 0.0348
Populations 1 & 2 = (22, 17)	